Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

CITY OF ATLANTIC CITY,

Petitioner,

v.

MILTON PEVNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

MARK F. KLUGER
Counsel of Record
KAREN M. WILLIAMS
JASINSKI AND PARANAC, P.C.
Ten Park Place
Newark, New Jersey 07102
(973) 824-9700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

A. Whether this Court's holding in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) which precludes punitive damages against a municipality under 42 U.S.C. § 1983 also precludes awards that are so grossly excessive to be deemed punitive.

B. Whether the jury award of $1,238,788.50 and the District Court's remittitur of that award to $863,130, bear a rational relationship to the evidence presented.

C. Whether plaintiff's injuries occurring three years after the alleged constitutional violation ceased were insufficient to satisfy this Court's requirement for proximate cause.

D. Whether the district court's award of prejudgment interest on a jury's general verdict contravenes well settled state law prohibiting prejudgment interest against a municipality.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding appear in the caption of this Petition.

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On December 29, 1994, the District Court granted Dr. Pevner's motion for summary judgment on the issue of the City's liability under § 1983 and the New Jersey State Constitution, reprinted in the appendix hereto. (App. 16)

The general Jury Verdict Sheet entered on March 22, 1996, awarding Plaintiff $1,238,788.50 in damages, reprinted in the appendix hereto. (App. 18)

The Judgment and Order of the United States District Court for the District of New Jersey (Rodriguez, U.S.D.J.), dated March 25, 1996, entering the jury verdict of $1,238,788.50, reprinted in the appendix hereto. (App. 19) The Order of the United States District Court for the District of New Jersey granting the City's motion for remittitur of the jury verdict to $863,130 representing $363,130 for special damages and $500,000 for compensatory damages, reprinted in the appendix hereto. (App. 20) Pevner's acceptance of the remittitur dated May 21, 1997, reprinted in the appendix hereto. (App. 53)

The Letter Opinion of the United States District Court for the District of New Jersey (Rodriguez, U.S.D.J.), dated May 30, 1997, awarding Pevner prejudgment interest, reprinted in the appendix hereto. (App. 58) The Order for an Amended Civil Judgment granting Pevner's motion to amend the judgment and awarding Pevner $131,404.83 in prejudgment interest, entered June 6, 1997, reprinted in the appendix hereto. (App. 56)

The February 9, 1998 Opinion and Judgment of the Court of Appeals for the Third Circuit, affirming the

Judgment of the United States District Court for the District of New Jersey, reprinted in the appendix hereto. (App. 63)

JURISDICTION

The Opinion of the Court of Appeals for the Third Circuit was filed and entered on February 9, 1998. The time for filing this petition runs from that date. Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1988, the City adopted Ordinance Number 1 of 1988 ("the Ordinance"), which, in relevant part, prohibited group family households from occupying dwelling units in "R-2" residential districts. Dr. Pevner was the co-owner of an eight bedroom dwelling unit located in a "R-2" residential district. After conducting an investigation of the property, the City issued Dr. Pevner 31 citations for violating the Ordinance over a three and a half year period. On February 15, 1991, Dr. Pevner was found guilty in Municipal Court and fined $3,000 and sentenced to one year probation.

On May 9, 1991, Dr. Pevner appealed the Municipal Court conviction to the Superior Court of New Jersey. On June 7, 1991, the Superior Court reversed the prior convictions and declared certain provisions of the Ordinance unconstitutional under the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution.

On May 27, 1993, Dr. Pevner filed the underlying action in the United States District Court for the District of New Jersey against the City alleging, *inter alia*, violations of 42 U.S.C. § 1983 and the New Jersey State Constitution stemming from the Municipal Court prosecution. (App. 1) The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4) based on the federal question presented.

This case involves Dr. Pevner's claim for damages for the § 1983 and constitutional violations. At the trial on damages, Dr. Pevner presented evidence which, if fully credited, would total $363,130.[1] On March 22, 1996, however, the jury returned a general verdict awarding Dr. Pevner $1,238,788.50, $875,000 more than the evidence offered at trial.

On November 12, 1996, the City filed a Motion for a New Trial or, in the alternative, for Remittitur, arguing that the outrageously excessive award reflected a runaway jury that improperly considered evidence and lost sight of its duty to the court. On May 13, 1997, the District Court, although agreeing with the City that the award was excessive and shocked the judicial conscience, only remitted the award to $863,130. Dr. Pevner accepted the remittitur of the jury verdict by letter dated May 21, 1997.

Dr. Pevner filed a Motion to Amend and Increase the Judgment pursuant to *Fed. R. Civ. P.* 59(e) to Include

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[1] Those damages would be calculated as follows:

Attorneys fees for the prosecution and appeal (App. 68-71):	$11,940
Lost rental income for the subject property (App. 71, 72):	$42,140
Medical (psychiatric) bills:	$ 6,925
Anticipated future psychiatric care:	$28,125
Lost income from alleged inability to practice dentistry due to stress of the municipal prosecution (1989-95) (App.65, 66, 67, 76):	$274,000
TOTAL:	$363,130

Prejudgment Interest. The City argued that Dr. Pevner was not entitled to an award of prejudgment interest because the jury's general verdict award must be presumed to have factored in the length of time between the alleged constitutional violation and the date of trial.

The City also argued that the jury's general verdict made it impossible to determine how much of the award constituted compensation for § 1983 violations and how much was for state constitutional violations. Under the New Jersey Tort Claims Act, Dr. Pevner is not entitled to recover damages for pain and suffering from the City for the tort damages suffered for state constitutional violations.

The City also argued that the size of the award and the nature of the constitutional violation at issue (that is, not involving any taking or withholding of money to which Dr. Pevner was otherwise entitled) militated against an exercise of the court's discretion to award prejudgment interest.

By Letter Opinion dated May 30, 1997, the District Court granted Dr. Pevner's Motion and awarded $131,404.83 in prejudgment interest, increasing the total award to Dr. Pevner to $994,534.83.

The United States Court of Appeals for the Third Circuit affirmed the June 6, 1997 Judgment of the District Court essentially finding that the Court had not abused its discretion.

Thus, despite the punitive nature of the jury award and subsequent remittitur, and the award of prejudgment interest which is expressly prohibited for any violation of the New Jersey Constitution, the district court and the

court of appeals upheld the excessive jury award disregarding this Court's holding that punitive damages are not available against a municipality and the New Jersey law prohibiting an award of prejudgment interest against a municipality.

ARGUMENT

I. THE JURY VERDICT AND TRIAL COURT'S REMITTITUR ARE PUNITIVE IN NATURE AND THEREFORE CONTRAVENE THIS COURT'S WELL SETTLED HOLDING THAT PUNITIVE DAMAGES ARE NOT AWARDABLE AGAINST A MUNICIPALITY IN § 1983 CASES

This Court has clearly established that plaintiffs are not entitled to punitive damages against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Since the $1.2 million verdict and the remitted $863,130 award in this case grossly exceed Dr. Pevner's evidence of damages, there is no other logical explanation for the jury's excessiveness than that it improperly sought to punish the City with the imposition of *de facto* punitive damages.

The proposition that an unsupportable jury award can amount to *de facto* punitive damages has been addressed and accepted by other circuit courts and has been utilized to support an appropriate remittitur. Here, the failure of the district court to recognize the patently punitive nature of the jury award and grant an appropriate remittitur has resulted in an award of punitive damages against a municipality pursuant to 42 U.S.C. § 1983.

For this reason the City's Petition for Writ of Certiorari should be granted.

Dr. Pevner's damages evidence, if fully credited, amounts to $363,130. However, the jury awarded Dr. Pevner $1,238,788.50. The general verdict makes it impossible to ascertain how the jury arrived at this amount. However, where the jury awarded a police brutality victim 1.5 million in compensatory damages in a § 1983 case, that court found the jury award to be improperly punitive. In *Sanders v. City of Indianapolis*, 837 F. Supp. 959 (S.D. Ind. 1992), plaintiff suffered two scalp wounds, a serious eye wound, soft tissue injuries, a broken leg and a broken knuckle. The Court held that $1.5 million "for the type of non-permanently disabling physical injuries Sanders suffered is exaggerated to the point of bearing no relationship to the evidence presented at trial." *Id.*, 837 F. Supp. at 966.

In ordering a remittitur from $1.5 million to $78,000, or a new trial, the court found that the jury's excessiveness could only be explained as punitive. *Id.*, 837 F. Supp. at 966-69.[2] In referring to an assessment of $500,000 against one police officer, the court observed:

> Such a damage award can only be understood as a form of punishment and vindictiveness. The jury exceeded its charge when it acted to punish the . . . police officers.

Id., 837 F. Supp. at 966.[3] Likewise, the jury's excessiveness in the case at bar can only be explained by an improper

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[2] The Court noted that punitive damages were not recoverable in Indiana. *Id.* at 966.

[3] *See also, Richardson v. Communications Workers of America*, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976), in which

motive to punish the City. As the Fourth Circuit held in a Tort Claims Act case, "to the extent that an award gives more than the actual loss suffered by the claimant, it is punitive. . . . " *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

In this case, the Third Circuit's reluctance to recognize or even address an obviously large and unsupportable general jury verdict as a punitive award conflicts with the decisions of other circuits. Moreover, allowing this punitive award to stand is inconsistent with this Court's holding in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). For this reason, the City's Petition for Writ of Certiorari should be granted.

II. NEITHER THE JURY AWARD OF $1.2 MILLION NOR THE REMITTED AWARD OF $863,130 BEARS ANY RATIONAL RELATIONSHIP TO THE EVIDENCE PRESENTED BY DR. PEVNER DEMONSTRATING NO MORE THAN $363,130 IN COMPENSABLE DAMAGES.

In this case, the District Court agreed that "the verdict was so excessive . . . as to shock the judicial

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the trial court ordered a new trial on the excessiveness of a $250,000 emotional distress award. The Eighth Circuit affirmed, holding:

> Plaintiff's damages arising from invidious discrimination were to be measured in terms of mental distress, anguish and humiliation caused him, but not as a means of punishing defendants. The Court concluded that the verdict was excessive and intended to punish the defendants or resulted from some other improper reason. . . .

Id., 530 F.2d at 130.

conscience." Order, May 13, 1997. (App. 47) Indeed, there can be no question that the jury's $1.2 million verdict was based on "passion or prejudice" or was simply excessive because Dr. Pevner's own proofs sought damages of no more than $363,130. Furthermore, the District Court remitted the award to $863,130, designating this award as $363,130 in special damages and $500,000 for pain and suffering. This remitted amount *remains* so excessive as to shock the judicial conscience. Further, the district court's characterization of the award demonstrates the extent to which the award conflicts with the holdings of this Court.

Plaintiffs in § 1983 cases are entitled to compensatory damages only for actual injuries resulting from the constitutional deprivation. *Carey v. Piphus*, 435 U.S. 247, 248 (1978). *See Spence v. Board of Education*, 806 F.2d 1198, 1201 (3d Cir. 1986); *Sanders v. City of Indianapolis*, 837 F. Supp. 959 (S.D. Ind. 1992). Moreover, such plaintiffs are not entitled to damages based on the abstract value of a constitutional right. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986). The only actual damages that Dr. Pevner even attempted to prove amount to $363,130. In addition, because this amount includes Dr. Pevner's lost income from his dental practice (a loss which could only be awarded due to pain and suffering), and psychiatric care and expenses, the $363,130 are Dr. Pevner's only actual injuries. Any amount in excess of this seeks to award Dr. Pevner for more than his actual injuries and therefore, conflicts with this courts decision in *Carey*.

III. PLAINTIFF FAILED TO PROVE THAT ANY EMOTIONAL DISTRESS HE MAY HAVE SUFFERED WAS PROXIMATELY CAUSED BY THE ALLEGED § 1983 VIOLATION.

Dr. Pevner failed to demonstrate the required causal nexus between the constitutional deprivation and his alleged emotional distress. The absence of this essential element of his complaint once again renders the district court's remittitur of damages insufficient to reconcile this case with decisions on the same issue in other federal circuits and the Supreme Court of New Jersey.

It is well established that the purpose of § 1983 damages is to compensate the individual for the actual injuries *caused* by the constitutional deprivation. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). It is also well settled that § 1983 gives rise to "a species of tort liability," requiring application of "common law rules of tort damages." *Cornelius v. LaCroix*, 646 F. Supp. 1106 (E.D. Wis. 1986), *aff'd in part and rev'd in part on other grounds*, 838 F.2d 207 (7th Cir. 1988). (Citing *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Carey*, 435 U.S. at 258).

In *Cornelius*, the Court held that an economic expert's analysis of future lost profits presented evidence too remote from the constitutional deprivation to be recoverable and that the projected losses were not proximately caused by the unconstitutional conduct. *Id.*, 646 F. Supp. at 1109. The Court described the applicable common law tort principles that should apply in a § 1983 damages analysis:

(1) Damages must be proved to a reasonable certainty; and

> (2) damages are not recoverable if they are too remote or are not proximately caused by the defendant's conduct.

Id., 646 F. Supp. at 1108.[4]

Similarly, the concept of proximate cause has been well defined in New Jersey case law. As the New Jersey Supreme Court explained,

> [T]he determination of proximate cause by a court is to be based upon mixed considerations of logic, common sense, justice, policy and precedent.

Caputzal v. The Lindsay Co., 48 N.J. 69, 77-78 (1966).

Further, the New Jersey Supreme Court addressed the issue of the recoverability of emotional distress damages in relation to the event allegedly causing the distress. *Williamson v. Waldman*, 150 N.J. 232 (1997). In *Williamson*, the plaintiff sought recovery for emotional distress related to a fear of contracting AIDS several years after suffering a lancet prick when she was cleaning a medical office garbage can. The court held:

> Emotional-distress damages must be based on the fears experienced by a reasonable and well-informed person. Thus, that emotional distress should be limited to the "window of anxiety," that is, the period after which such a reasonable

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[4] *See also, Miner v. City of Glens Falls*, 999 F.2d 655, 660 (2d Cir. 1993); *Nettles v. Griffith*, 883 F. Supp. 136, 145 (E.D. Tex. 1995) (holding that "Plaintiff may be awarded only such damages as the evidence shows to have been proximately caused by the defendant's wrongful conduct. Proximate cause includes components of cause in fact and foreseeability.").

> and well-informed person no longer would experience continuing emotional distress.

Id. In that case, the "window of anxiety" for a fear of contracting AIDS was six months to one year. *Id.* Thus the court denied damages for emotional distress outside the window of anxiety, finding that "**her continued distress is idiosyncratic, . . . that is, it exceeded the emotional distress that would be experienced by a reasonable and well-informed person.**" *Id.* (emphasis added).

Simply stated, a review of the pertinent decisions of the federal circuits and the Supreme Court of New Jersey identify the following concepts as essential to establishing proximate cause for injuries: (a) cause in fact (b) proximity in time between the act and the distress and (c) foreseeability.

In viewing the evidence presented by Dr. Pevner in this case it is clear that the City's alleged § 1983 violation was not the proximate cause of his emotional distress. Although there was some testimony that Dr. Pevner had been anxious, upset, and sad prior to 1994, without question, the most significant and dramatic testimony regarding emotional distress involved events which occurred long after the City's § 1983 violations had ceased. The evidence presented established the following chain of events:

- Dr. Pevner received 31 summons directed to him for alleged ordinance violations during a two year period between 1989 and 1991.

- In February 1991, he was convicted and fined in municipal court.
- In June 1991, the Superior Court overturned his conviction and declared the Ordinance unconstitutional.
- In May 1993, Dr. Pevner filed this lawsuit.

At no time between 1989 and 1991 did Dr. Pevner seek any psychiatric treatment. In fact, more than three years passed between the City's alleged § 1983 violation and the time Dr. Pevner first sought treatment from a psychiatrist. Moreover, this lawsuit had been pending for over a year before Dr. Pevner sought psychiatric treatment.

- In May 1994, the City sent Plaintiff a letter seeking information regarding the tenants that resided in his commercial property.
- Dr. Pevner wrote back to the City in a business-like manner and provided the City with the information it sought.
- In August 1994, Dr. Pevner returned home from a vacation, discovered a number of envelopes from the City and allegedly had a severe emotional reaction.

The content of the August 1994 envelopes from the City remains a mystery because neither Dr. Pevner nor his wife ever opened these envelopes.

Although the jury was not so instructed, the May 1994 letter and the August 1994 unopened envelopes were not constitutional deprivations for which § 1983 damages are awardable. The City did not violate § 1983 by corresponding with Dr. Pevner, a property owner in the City. The only injuries for which damages should be

awardable are those injuries proximately caused by the Municipal Prosecution which ended in 1991.

The emotional distress that Dr. Pevner suffered in 1994 could not satisfy the requirements of proximate cause established by federal circuits or the State of New Jersey. It would be a disturbing and dangerous precedent for the City to have to compensate Dr. Pevner for an emotional reaction of this nature, so remote from the § 1983 violation. The alleged injury here is far too remote from the § 1983 violations and the jury's verdict was no doubt based on impermissible considerations of passion or prejudice. Moreover, a determination based on this evidence is inconsistent with the laws of the State of New Jersey as set forth in *Caputzal* and other circuits as set forth in *Cornelius*. For these reasons a Writ of Certiorari should issue.

IV. DR. PEVNER IS NOT ENTITLED TO AN ADDITIONAL AWARD OF PREJUDGMENT INTEREST.

Since the damages award was a general verdict, it is impossible to determine what portion of the award was intended to compensate Dr. Pevner for the alleged § 1983 violations and what portion was intended to compensate him for damages arising from the alleged violations of the New Jersey State Constitution. Therefore, the District Court's decision awarding Dr. Pevner an additional $131,404.83 in prejudgment interest, conflicts with the laws of the Third Circuit and the State of New Jersey.

Section 1983 contains no provisions regarding the availability of prejudgment interest. Where the federal statute does not explicitly address prejudgment interest,

the rule is that "a court may award prejudgment interest in accordance with its equitable discretion." *Rao v. New York City Health and Hospitals Corp.*, 882 F. Supp. 321, 325 (S.D.N.Y. 1995). The Supreme Court has determined that damages awards under § 1983 should "accord meaningful compensation" to plaintiffs for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (addressing availability of damages for procedural due process violations).

Dr. Pevner sought prejudgment interest on his "compensatory tort damages" pursuant to New Jersey Rule 4:42-11(b) on his parallel state claim that his rights under the New Jersey State Constitution were violated. Insofar as the jury rendered a general verdict, the City is unable to determine whether all or part of the jury verdict is for Dr. Pevner's state law claims. This distinction is particularly significant to the extent that the $875,658.50 amount of the award over and above the proof of alleged loss represents an award of pain and suffering. The New Jersey Tort Claims Act prohibits recovery of damages for pain and suffering against a public entity. *N.J.S.A.* 59:9-2(d) ("No damages shall be awarded against a public entity . . . for pain and suffering resulting from any injury. . . . ").

To the extent that the damage award represents compensation for violation of Dr. Pevner's rights under the New Jersey State Constitution, the New Jersey Tort Claims Act governs Dr. Pevner's claims for damages against the City. *N.J.S.A.* 59:1-1 to 10A-6; *Lloyd v. Borough of Stone Harbor*, 179 N.J. Super. 496, 511-12 (Ch. Div. 1981) (public entity liability for "injury" under the New Jersey Tort Claims Act includes liability for damages caused by

a violation of constitutional rights). The Tort Claims Act clearly precludes recovery of prejudgment interest against the City. "No interest shall accrue prior to the entry of judgment against a public entity or public employee." *N.J.S.A.* 59:9-2(a).

As the City of Atlantic City is a public entity within the meaning of the New Jersey Tort Claims Act, and the New Jersey Tort Claims Act prohibits recovery of prejudgment interest against a public entity, the exceptions to Rule 4:42-11(b) govern and the City cannot be held liable for prejudgment interest on Dr. Pevner's damage award. Since the District Court was unable to determine which portion of the jury award constituted compensation for alleged state constitutional violations, to the extent this award includes the State law claims, the award of prejudgment interest on that amount conflicts with the law of the State of New Jersey. Therefore no prejudgment interest should have been awarded. For this reason, the City's Petition for Writ of Certiorari should be granted.

CONCLUSION

This Court should issue a Writ of Certiorari because (a) it is the only mechanism by which this inherently punitive award, an award prohibited by this Court, can be remedied; (b) there is no rational basis for the award as required by law; and (c) the award of prejudgment interest is wholly contrary to the laws of the State of New Jersey.

Respectfully submitted,

MARK F. KLUGER, Esq.
KAREN M. WILLIAMS
JASINSKI and PARANAC, P.C.
Ten Park Place
Newark, New Jersey 07102
(973) 824-9700

Dated: May 8, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FRANK MC GRATH 6503 Ventnor Avenue Ventnor, NJ 08406 and MILTON PEVNER 1420 Locust Street, Apt. 271 Philadelphia, PA 19102 Plaintiffs, vs. CITY OF ATLANTIC CITY 1301 Bacharach Boulevard Atlantic City, NJ 08401 Defendant	CIVIL ACTION NO. 93CV2295(JHR) JURY TRIAL DEMANDED (Filed May 27, 1993)

COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a Civil Rights Action seeking declaratory and injunctive relief, money damages and other relief based upon a cause of action arising under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 2201 and 2202. Plaintiffs seek to redress the deprivation by defendant under color of state law of their rights which were secured by the Fourteenth Amendment to the United States Constitution. The said deprivations resulted from the criminal prosecution of plaintiffs pursuant to a certain Ordinance promulgated, adopted and enforced by defendant which was declared unconstitutional by the Superior Court of the State of

New Jersey on or about June 19, 1991, after the plaintiffs had been wrongfully charged, prosecuted and convicted thereunder.

2. The said Ordinance has deprived the plaintiffs of their rights to due process of law and equal protection under the law. Plaintiffs seek to enjoin the defendant from further enforcing or attempting to enforce the said Ordinance as to them, an order declaring that their rights under the Fourteenth Amendment were violated by defendant through its enforcement of and prosecution of them under the Ordinance, an award of money damages to compensate them for defendant's violations of their rights under the Fourteenth Amendment, and an award of costs, including a reasonable attorney's fee.

3. Plaintiffs also invoke the pendent jurisdiction of this Court to hear their claims arising under New Jersey state law. Plaintiffs further allege that, by enforcing the Ordinance against them, defendant also deprived them of certain rights secured under the New Jersey Constitution.

II. JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1331 and 28 U.S.C. Sec. 1343(3) and (4).

5. Venue is proper in this judicial district because the events and occurrences giving rise to this claim occurred here, the property that is the subject of the action is situated here, and the defendant resides here.

III. PARTIES

6. Plaintiff, Frank McGrath, is an adult individual and a citizen of the state of New Jersey who at all times material to this action was a resident of Atlantic County, New Jersey, and maintained an address at 6503 Ventnor Avenue, Ventnor, New Jersey 08406.

7. Plaintiff, Milton Pevner, is an adult individual and a citizen of the Commonwealth of Pennsylvania, who at all times material to this action resided in Philadelphia County, Pennsylvania, at 1420 Locust Street, Apt. 271, Philadelphia, Pennsylvania 19102.

8. Defendant, City of Atlantic City, is a municipal corporation duly founded and chartered under the laws of the state of New Jersey. At all times material, the executive office of defendant was located at 1301 Bacharach Boulevard, Atlantic City, New Jersey 08401.

IV. STATEMENT OF FACTS

9. Plaintiffs incorporate by reference thereto all of the allegations of paragraphs 1-8, above, as though same were set forth more fully and at length hereat.

10. At all times material to this action, plaintiffs, Frank McGrath and Milton Pevner (known herein as "plaintiffs"), were the co-owners of a certain residential property and premises located at 38 South Tallahassee Avenue, Atlantic City, New Jersey (known herein as "the Property").

11. At all times material, the Property was located in a residential district which was designated by defendant as an "R-2 Zone".

12. Prior to the events and occurrences giving rise to this claim, the defendant, City of Atlantic City, through its duly authorized agents and officers, introduced, approved, promulgated, implemented and adopted a certain Ordinance known as Ordinance No. 1 of 1988, Section 163.15 and Section 163.66, as amended April 24, 1980 by Ordinance No. 44 of 1980 (known herein as "the Ordinance").

13. The Ordinance defined a "group family household" as a group of four or more persons not related by blood, marriage or adoption, "living together in a dwelling unit as a single housekeeping unit under a common housekeeping management based on an intentionally structured relationship of mutual responsibility and providing an organization and stability essentially equivalent to that found in families based on relationships of marriage and blood".

14. The Ordinance defined a "family" as: "One or more persons related by blood, marriage, adoption or guardianship, or not more than three persons not so related, occuping [sic] a dwelling unit and living as a single housekeeping unit".

15. The Ordinance provided that "group family households" as defined by the Ordinance could only occupy dwelling units within the City of Atlantic City in residential districts other than districts designated as "R-1" and "R-2" zones, and that only "families" could occupy dwelling units in "R-1" and "R-2" zones. At all times material, the Property was located in an "R-2" zone. The Ordinance provided for criminal penalties if a violation could be proven.

16. Beginning in 1989 and continuing until June of 1991, the defendant charged and prosecuted the plaintiffs under the Ordinance, contending, *inter alia*, that on various dates during 1989 and 1990, more than three persons not related by blood, marriage, adoption or guardianship were occuping [sic] and/or residing in the Property in violation of the Ordinance. The plaintiffs were also charged by defendant with converting the Property into a rooming house, in further violation of the Ordinance.

17. On February 15, 1991, after conducting three days of hearings on the criminal charges brought by defendant against plaintiffs that plaintiffs had violated the Ordinance repeatedly, the Honorable Bruce Weekes of the Atlantic City Municipal Court found the plaintiffs guilty on approximately sixty-two (62) counts of violating the Ordinance by *inter alia* permitting more than three unrelated persons to occupy the Property on the dates in question.

18. On February 15, 1991, upon convicting the plaintiffs of violating the Ordinance, the Atlantic City Municipal Court assessed fines against the plaintiffs totalling $3,100.00.

19. During the course of the proceedings before the Atlantic City Municipal Court, and prior to their convictions, plaintiffs, through their attorneys, pleaded not guilty and opposed the charges against them under the Ordinance.

20. Throughout the course of the proceedings before the Atlantic City Municipal Court, and prior thereto, defendant continuously sought to enforce the Ordinance against plaintiffs and to convict them thereunder.

21. Plaintiffs, through their attorneys, appealed to the Superior Court of New Jersey from the decision of the Atlantic City Municipal Court finding them guilty on approximately sixty-two (62) counts of violating the Ordinance.

22. On or about June 19, 1991, the Superior Court of New Jersey (Braithwaite, J.), entered an order reversing the previous convictions against plaintiffs, and finding plaintiffs not guilty of any and all charges of violating the Ordinance. In its order, the Superior Court of New Jersey declared the Ordinance unconstitutional in that it violated the Fourteenth Amendment of the United States Constitution and Article 1, Section 20 of the New Jersey Constitution by "plac[ing] unreasonable restrictions upon [plaintiffs'] right to use or rent their properties, contrary to the Constitutional requirements of substantive due process". In reversing the convictions, the Superior Court of New Jersey further ruled that "there was insufficient, credible admissible evidence on the record to prove that either [plaintiff] committed any wrongdoing in any of the cases charged in the Municipal Court".

23. Defendant did not appeal from or request reconsideration of the order of the Superior Court of New Jersey entered on or about June 19, 1991. Accordingly, that order became a final and binding judicial decision that the Ordinance was unconstitutional and in violation of the Fourteenth Amendment and the New Jersey Constitution, and plaintiffs' claims asserted herein accrued on June 19, 1991.

V. FIRST CAUSE

24. Plaintiffs incorporate by reference thereto, all of the allegations of paragraphs 1-23, above, as though same were set forth more fully and at length hereat.

25. The Ordinance under which plaintiffs were prosecuted and convicted, was officially promulgated, enacted, adopted and enforced by defendant and its officers, and it therefore constituted a policy of defendant.

26. In enforcing the Ordinance against plaintiffs, defendant, acting under color of state law, caused plaintiffs to be deprived of certain rights, privileges and immunities secured by the United States Constitution, and in particular, rights and privileges guaranteed them by the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

27. The Ordinance, by its terms and as it was applied to plaintiffs, violated plaintiffs' right to due process of law under the Fourteenth Amendment in that there was no rational relationship between the Ordinance and its purported objectives, i.e., the preservation of "family style living" in residential neighborhoods, preserving the integrity of such neighborhoods and preserving the quality of life in such neighborhoods, and therefore, the Ordinance was unreasonable, unduly burdensome and beyond the scope of the legitimate police powers of defendant.

28. In addition, the Ordinance was arbitrary and capricious, bearing no substantial relation to the public health, safety, morals or general welfare of defendant and

its residents, and was therefore an invalid exercise of the police powers of defendant and in violation of the Due Process Clause of the Fourteenth Amendment.

29. As it was correctly determined by the Superior Court of New Jersey, the Ordinance placed unreasonable restrictions upon plaintiffs' right to use and rent the Property as they saw fit, in contravention and violation of the Due Process Clause of the Fourteenth Amendment.

30. The Ordinance violated plaintiffs' rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment in that it arbitrarily, capriciously and unreasonably distinguished between residential occupancy by unrelated persons and occupancy by persons who were related by blood, marriage, adoption or guardianship, and allowed an unlimited number of "related" persons to occupy the Property but restricted the number of "unrelated" persons who could occupy the Property.

31. The Ordinance provided no fair or reasonable guidelines or standards upon which one could judge or assess the potential for violating the Ordinance, or what specific conduct was or was not precluded or prohibited by the Ordinance, thereby rendering the Ordinance arbitrary and capricious and in violation of the Due Process Clause of the Fourteen Amendment.

32. The Ordinance further violated the Due Process Clause of the Fourteenth Amendment in that it was couched and worded in language and terms which were impermissibly vague and overbroad, thereby failing to give reasonable or adequate notice to property owners, and so sweeping in prohibiting activities which were

legal, harmless and constitutionally protected, that it resulted or could have resulted in arbitrary enforcement of the Ordinance at the whim and caprice of defendant.

33. The Ordinance violated the Equal Protection Clause of the Fourteenth Amendment by arbitrarily, unreasonably and invidiously discriminating against plaintiffs for the reasons stated above, without bearing any rational relationship to any legitimate Governmental purpose of objective.

34. While plaintiffs were being prosecuted under the Ordinance, defendant knew or had reason to know that the Ordinance would be declared unconstitutional based on controlling legal precedents and decisional law.

35. Prior to the ruling of the Superior Court of New Jersey, plaintiffs were vigilant and diligent in pursuing their remedies against the validity and applicability of the Ordinance, and defendant continuously opposed plaintiffs and sought to enforce the Ordinance against them, as a result of which plaintiffs were prevented and precluded from enjoying, using or renting the Property as they saw fit, or to the fullest extent possible, until the superior Court of New Jersey issued its decision invalidating the Ordinance.

36. As a proximate result of defendant's violations of their rights under the Fourteenth Amendment, and in particular their rights under the Due Process Clause and the Equal Protection Clause, plaintiffs were caused to incur substantial legal fees defending the criminal charges brought by defendant and appealing their convictions, for which they are entitled to be compensated.

37. As a proximate result of defendant's violations of their rights under the Fourteenth Amendment, as alleged above, plaintiffs were deprived of and denied the full use and enjoyment of the Property and the right to use or rent the Property as they wished from 1989 to 1991, and as a consequence thereof, plaintiffs were caused to suffer a substantial loss of rental and other income, for which they are entitled to be compensated.

38. As a proximate result of defendant's violations of their rights under the Fourteenth Amendment, as alleged above, plaintiffs were caused to suffer mental anguish, emotional distress, embarrassment and humiliation, fright, fear, personal indignity and anxiety, for which they are entitled to be compensated.

39. As a proximate result of defendant's violations of their rights under the Fourteenth Amendment, as alleged above, the reputations of plaintiffs in the community at large were damaged and harmed and plaintiffs were brought into disgrace and disrepute among their neighbors, friends, fellow citizens and other persons, for which they are entitled to be compensated.

40. As a proximate result of defendant's violations of their rights under the Fourteenth Amendment, as alleged above, plaintiffs' credit rating was damaged and impaired and they suffered a loss of credit, for which they are entitled to be compensated.

WHEREFOR, plaintiffs respectfully pray that this Honorable Court enter an order:

(a) Declaring that defendant violated plaintiffs' rights under the Fourteenth Amendment, and in particular, their rights under the Due Process Clause and the Equal Protection Clause, by enforcing the Ordinance;

(b) Granting a preliminary and permanent injunction restraining and enjoining defendant and its agents, servants, employees and officers, from further enforcing or attempting to enforce the Ordinance against plaintiffs;

(c) Awarding plaintiffs monetary damages to compensate them for the violations of their rights secured by the Fourteenth Amendment;

(d) Awarding plaintiffs the costs of litigation, including a reasonable attorney's fee; and

(e) Granting to plaintiffs such other relief as may be deemed necessary, just and appropriate.

VI. SECOND CAUSE

41. Plaintiffs incorporate by reference thereto, all of the allegations of paragraphs 1-40, above, as though same were set forth more fully and at length hereat.

42. Under the doctrines of collateral estoppel and/or res judicata, plaintiffs are entitled to a declaratory judgment, based on the order of the Superior Court of New Jersey entered on June 19, 1991, that the Ordinance is unconstitutional and in violation of the Fourteenth Amendment in that it "placed unreasonable restrictions upon [plaintiffs'] right to use or rent their properties, contrary to the Constitutional requirements of substantive due process".

WHEREFORE, plaintiffs respectfully pray that this Honorable Court enter an order:

(a) Declaring that the Ordinance is violative of plaintiffs' right to substantive due process under the Fourteenth Amendment in that it placed unreasonable restrictions upon their right to use or rent their properties;

(b) Awarding plaintiffs the costs of litigation, including a reasonable attorney's fee; and

(c) Granting to plaintiffs such other relief as may be deemed necessary, just and appropriate.

VII. THIRD CAUSE

43. Plaintiffs incorporate by reference thereto, all of the allegations of paragraphs 1-42, above, as though same were set forth more fully and at length hereat.

44. By reason of the foregoing acts of defendant, plaintiffs' rights to due process of law and equal protection under the law guaranteed and secured by the New Jersey Constitution, and in particular, Article 1, Section 1 and Article 1, Section 20 of the Constitution, were violated by defendant.

45. The actions of defendant, as alleged above, constituted a taking by defendant of plaintiffs' private property without just compensation, in violation of Article 1, Section 20 of the New Jersey Constitution.

46. By reason of the foregoing, and pursuant to the doctrines of collateral estopel and/or res judicata, plaintiffs are entitled to a declaratory judgment, based on the

order of the Superior Court of New Jersey dated June 19, 1991, that the Ordinance was unconstitutional and in violation of Article 1, Section 20 of the New Jersey Constitution, in that it "placed unreasonable restrictions upon [plaintiffs'] right to use or rent their properties, contrary to the Constitutional requirements of substantive due process".

47. As a proximate result of defendant's violations of their rights under the New Jersey Constitution, plaintiffs were caused to incur substantial legal fees defending the criminal charges brought by defendant and appealing their convictions, for which they are entitled to be compensated.

48. As a proximate result of defendant's violations of their rights under the New Jersey Constitution, as alleged above, plaintiffs were deprived of and denied the full use and enjoyment of the Property and the right to use and rent the Property as they wished from 1989 to 1991, and as a consequence thereof, plaintiffs were caused to suffer a substantial loss of rental and other income, for which they are entitled to be compensated.

49. As a proximate result of defendant's violations of their rights under the New Jersey Constitution, as alleged above, plaintiffs were caused to suffer mental anguish, emotional distress, embarrassment and humiliation, fright, fear, personal indignity and anxiety, for which they are entitled to be compensated.

50. As a proximate result of defendant's violations of their rights under the New Jersey Constitution, as alleged above, the reputations of plaintiffs in the community at large were damaged and harmed and plaintiffs

were brought into disgrace and disrepute among their neighbors, friends, fellow citizens and other persons, for which they are entitled to be compensated.

51. As a proximate result of defendant's violations of their rights under the New Jersey Constitution, as alleged above, plaintiffs' credit rating was damaged and harmed and they suffered a loss of credit, for which they are entitled to be compensated.

WHEREFORE, plaintiffs respectfully pray that this Honorable Court enter an order:

(a) Declaring that the Ordinance was violative of plaintiffs' rights to due process of law and equal protection under the law secured by Article 1, Section 1 and Article 1, Section 20 of the New Jersey Constitution;

(b) Declaring that the Ordinance resulted in a taking by defendant of plaintiffs' private property without just compensation, in violation of Article 1, Section 20 of the New Jersey Constitution;

(c) Granting a preliminary and permanent injunction restraining and enjoining defendant and its agents, servants, employees and officers, from enforcing or attempting to enforce the Ordinance against plaintiffs;

(d) Awarding monetary damages to plaintiffs to compensate them for their actual losses, damages and injuries resulting from defendant's violations of their rights under the New Jersey Constitution; and

(e) Granting to plaintiffs such other relief as may be deemed necessary, just and appropriate.

/s/ Lisa G. Miller
LISA G. MILLER
Attorney for Plaintiffs

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
1847 East Marlton Pike (Rte. 70)
Cherry Hill, NJ 08003
(609) 751-8600

DATED: May 27, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANK McGRATH, et al., Plaintiffs, v. CITY OF ATLANTIC CITY, Defendant.	:	Hon. Joseph H. Rodriguez Civil Action No. 93-2295 ORDER (Filed Dec. 29, 1994)

Plaintiffs, Frank McGrath and Milton Pevner, by their attorneys, have moved this court for an order, pursuant to Fed. R. Civ. P. 56, granting summary judgment in favor of plaintiffs against defendant, City of Atlantic City, on plaintiffs' liability claims arising under 42 U.S.C. § 1983 and the New Jersey Constitution, as alleged in Counts One, Two and Three of plaintiffs' complaint.

Defendant, City of Atlantic City, by their attorneys, have also moved this court for an order, pursuant to Fed. R. Civ. P. 56, granting summary judgment in favor of defendant against plaintiffs' liability claims arising under 42 U.S.C. § 1983 and the New Jersey Constitution, as alleged in Counts One, Two and Three of plaintiffs' complaint.

The motions were heard on December 29, 1994 by way of telephone conference and the court having considered the motion, briefs in support thereof and in opposition thereto, the statements of material facts submitted by the parties, exhibits and other materials submitted by the parties and the oral arguments of each party, and for the reasons expressed on the record of December 29, 1994,

IT IS ORDERED on this 29th day of December, 1994 as follows:

1. Summary judgment is hereby *GRANTED* in favor of plaintiffs and against defendant on the liability claims asserted by plaintiffs in Counts One and Two of the complaint under 42 U.S.C. § 1983.

2. Summary judgment is hereby *GRANTED* in favor of plaintiffs and against defendant on plaintiffs' liability claims asserted in Count Three of the complaint under the New Jersey Constitution.

3. This court has determined as a matter of law that defendant violated 42 U.S.C. § 1983 and the New Jersey Constitution, and plaintiffs' rights to due process thereunder, by prosecuting plaintiffs under Atlantic City Ordinance No. 1 of 1988, and by otherwise enforcing the said Ordinance against plaintiffs.

4. Defendant's motion for summary judgment on Counts One, Two and Three of plaintiffs' complaint is *DENIED*.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MILTON PEVNER, Plaintiff,	:	Hon. Joseph H. Rodriguez
v.	:	Civil Action No. 93-2295
CITY OF ATLANTIC CITY, Defendant.	:	VERDICT SHEET
	:	(Filed Mar. 22, 1996)

1. Do you find that plaintiff Milton Pevner sustained damages?

Yes X No _

If your answer to Question #1 is *yes*, then proceed to Question #2. If your answer is *no*, you may end your deliberations and return your verdict.

2. What amount do you find will reasonably and fairly compensate plaintiff Milton Pevner for the damages he has sustained?

$$1,238,788.50

/s/ Gary Rambo
Foreperson

Dated: March 22, 1996

United States District Court

DISTRICT OF NEW JERSEY

MILTON PEVNER

plaintiff

v.

CITY OF ATLANTIC CITY

defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-2295(JHR)

(Filed Mar. 25, 1996)

X **Jury Verdict.** This action came before the Court for a tral [sic] by jury. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that a Judgment be entered in favor of Plaintiff, Milton Pevner for damages in the amount of $1,238,788.50 and against defendant, City of Atlantic City with _____ costs.

March 25, 1996
Date

/s/ Joseph H. Rodriguez
Honorable Joseph H. Rodriguez,
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MILTON PEVNER,	:	Hon. Joseph H. Rodriguez
Plaintiff,	:	Civil Action No. 93-2295 (JHR)
v.	:	
CITY OF ATLANTIC CITY,	:	ORDER
Defendant.	:	(Filed May 13, 1997)

This matter comes before the court on the City of Atlantic City's motion pursuant to Fed. R. Civ. P. 59 for a new trial or, in the alternative, for remittitur of the jury verdict in this case. By Order dated April 15, 1996, this court stayed defendant's motion for a new trial or remittitur to allow defendant to retain substitute counsel and to permit counsel to obtain trial transcripts and to prepare memoranda of law. The matter was fully briefed by the parties, and a return date of February 21, 1997 was assigned. A hearing, at which the court reserved its decision, was held on February 28, 1997. This Order constitutes the opinion of the court with respect to defendant's motion for a new trial or for remittitur.

I. BACKGROUND

In 1988, plaintiff, Dr. Milton Pevner, and his business associate, Frank McGrath, purchased five properties in Atlantic City with the intention of renting them out for income. One of those properties was an eight-bedroom house located at 38 South Tallahassee Avenue (the "Property"). At the time that plaintiff purchased the Property,

the City had in effect a restrictive zoning ordinance (the "Ordinance") which prohibited landlords from renting rooms to more than three persons unrelated by blood.

Beginning in the spring of 1989 and continuing through June of 1991, the City issued more than 60 summonses to Dr. Pevner and Mr. McGrath for violations of the Ordinance, 31 of which were directed to Dr. Pevner. Plaintiff pleaded not guilty to all charges. If convicted, the plaintiff faced the potential of being sentenced to more than ten years in jail.[1] Four days of hearings were conducted in municipal court between October 1990 and February 1991. A Special Prosecutor, George Polis, was hired by the City to prosecute the plaintiff in what was to be the "test case" for enforcement of the City's land use ordinance. City Councilwoman Pomenterri, the mayor of the City of Atlantic City and the City Solicitor each attended at least one day of the municipal court trial. Publicity about the trial was widespread in and around the Atlantic City area. On February 15, 1991, the court

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[1] The Ordinance provided in relevant part as follows:

> [A]ny person violating the provisions of this chapter shall, upon conviction in the Municipal Court of the City of Atlantic City, be punished for each offense by a fine not exceeding five hundred dollars ($500) or by imprisonment for a term not exceeding ninety (90) days in the county jail or in any place provided by the City of Atlantic City for the detention of prisoners, or both. Each separate provision of this chapter violated and each day on which any such violation continues shall be considered a separate offense.

(Ex. P-11).

convicted plaintiff on all charges and sentenced him to one year probation and ordered him to pay a $3,000 fine.

Plaintiff appealed to the Superior Court of New Jersey, Criminal Division. By Order dated June 7, 1991, the Superior Court declared certain provisions of the Ordinance to be unconstitutional because it "placed unreasonable restrictions upon [plaintiff's] right to use and rent [the Property], contrary to the Constitutional requirements of substantive due process" as guaranteed by the Fourteenth Amendment and the New Jersey Constitution. The Superior Court also reversed the plaintiff's conviction, finding that "[t]here was insufficient, credible admissible evidence on the record to prove that [plaintiff] committed any wrongdoing." The City did not appeal from or request reconsideration of the Superior Court ruling.

On May 27, 1993, Dr. Pevner and Mr. McGrath filed this action against the City of Atlantic City (the "City"), alleging violations of the United States and New Jersey Constitutions.[2] Jurisdiction was based upon 42 U.S.C. § 1983. Cross-motions for summary judgment were filed, and by Order dated December 29, 1994, this court granted plaintiff's motion for summary judgment on the issue of the City's liability under Section 1983. A jury trial on plaintiff's claim for damages was conducted between March 18, 1996 and March 21, 1996.

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[2] Frank McGrath, now deceased, assigned his interest in this suit to Milton Pevner shortly before his death. Thus, Dr. Pevner was the only plaintiff at trial.

Nine witnesses testified for the plaintiff during the damages trial. Plaintiff's wife, Eleanor Pevner, testified that she met Dr. Pevner while he was attending dental school, that they married shortly thereafter, and had three children together. (T2, 65-69).[3] Dr. Pevner opened a neighborhood dental practice shortly before the birth of their first child. She testified that Dr. Pevenr worked twelve hour days and often worked on weekends. (T2, 72). She stated that Dr. Pevner's income from the practice "averaged about . . . $40,000 per year." (T2, 81). Dr. Pevner was a boy scout troop leader and an officer in a local civic organization and in his synagogue. (T2, 71-72). He sometimes offered to take local high school students to the Metropolitan Opera in New York City. (T2, 73).

Mrs. Pevner testified about the changes she witnessed in Dr. Pevner as a result of the municipal citations. She stated that he became depressed and pessimistic, frequently talking about receiving the citations and about the possibility of going to prison. (T2, 95). She testified that he used to be socially active, but he no longer wanted to leave home, even for dinner. Although they often took vacations in the past, he no longer wanted to go. Instead, he slept and watched television. (T2, 95-96). He went to his dental office less and less frequently, sometimes breaking appointments with patients. (T2, 96).

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[3] References to the Trial Transcript are as follows:

"T1, ___" – Testimony of March 18, 1996

"T2, ___" – Testimony of March 19, 1996

"T3, ___" – Testimony of March 20, 1996

"T4, ___" – Testimony of March 21, 1996

She testified that he did not want to see new patients. (T2, 108).

By letter date May 17, 1994, the City of Atlantic City requested additional information regarding Dr. Pevner's application for Certificates of Land Use Compliance, citing portions of the Ordinance under which he had been prosecuted. Mrs. Pevner testified that, in response to the May 17, 1994 letter Dr. Pevner became panicky and felt that the City was again attempting to prosecute him under its landuse ordinance. (T2, 115). She testified that Dr. Pevner called his attorney regarding the City's letter. He then prepared and hand delivered his response which providing [sic] the requested information. (T2, 118-120). Dr. and Mrs. Pevner then traveled to France where they had a timeshare condominium. (T2, 123). She testified that Dr. Pevner's mood did not change while in Europe. He continued to sleep a lot and to stay in the room rather than go out for food or to shop. (T2, 123-24).

Mrs. Pevner further testified that, upon returning to their home, they found a pile of mail from the City on the dining room table. In response, Dr. Pevner threw the mail in the air, yelled, made strange noises, crawled on the floor, claimed that he was still in France and sang the nursery rhyme Frere Jacques. (T2, 126, 128).

The next morning, Dr. and Mrs. Pevner went to their daughter's home in Allentown, Pennsylvania, where they stayed for approximately five weeks. (T2, 134, 138-39). Upon his arrival, Dr. Pevner did not recognize his baby grandson, and he was afraid to sleep in a room by himself. That night, he wet his pants. (T2, 133; T3, 50).

Plaintiff first sought psychiatric care after this episode. Dr. Robert Zibelman,[4] the psychiatrist who treated and continues to treat the plaintiff, testified that Dr. Pevner first came to see him on October 3, 1994. (T2, 199). At that time, Dr. Zibelman observed that the plaintiff was "not psychotic" and that he was "in contact with the world." (T2, 204). Dr. Pevner was nervous, sad and depressed because of the prosecution, and he was afraid to return to Atlantic City. (T2, 204). He had withdrawn from his friends and was not relating with his family in the way that he had prior to the prosecution. He lost confidence in himself and could not concentrate, and as a result, "he was no longer able to practice dentistry as he once had." (T2, 204). Dr. Zibelman diagnosed plaintiff as having an anxiety disorder, which was characterized by anxiety, sleep impairment, an inability to concentrate, and snapping out at those around him. (T2, 205). He also diagnosed Dr. Pevner as having a dissociative amnestic disorder, characterized by loss of contact with the world in response to stress. (T2, 205-06). Dr. Zibelman attributed Dr. Pevner's condition to the stress of the municipal

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[4] Robert Zibelman, M.D. is licensed to practice medicine in Pennsylvania and in California. He has been Board-Certified in General Psychiatry since 1982 and has been Board-Eligible in Child and Adolescent Psychiatry since 1980. He is currently engaged in the private practice of general psychiatry. Since 1980 he has been and continues to be a psychiatric consultant to the Philadelphia School District and he is a clinical assistant professor of psychiatry and human behavior at Jefferson Medical College. He has numerous professional affiliations and is on the medical staff of Thomas Jefferson University Hospital, Philadelphia Psychiatric Center, Albert Einstein Medical Center, and Friends Hospital. (Exh. P-17).

prosecution. (T2, 206). On cross examination, Dr. Zibelman testified that he learned for the first time about five of the six amnestic episodes from Mrs. Pevner two weeks prior to trial. (T2, 220).

Dr. Zibelman testified that Dr. Pevner often mentioned the municipal prosecution during therapy, and recounted one recent session where Dr. Pevner became so anxious that Dr. Zibelman had to medicate him during the session. (T2, 209). He stated that he prescribed Prozac for depression and Xanax for anxiety. (T2, 206). Dr. Zibelman's bill for treating the plaintiff up to the time of trial was $6,925. (T2, 217). Although he initially believed that he would be treating Dr. Pevner for one year, at the time of trial he anticipated treating Pevner for another five years. (T2, 206). The defendant did not offer any psychiatric testimony to rebut Dr. Zibelman's testimony.

Plaintiff alleged that, as a result of the municipal prosecution, he was unable to continue practicing dentistry as he had before and he sought damages in the amount of his annual earnings. Mrs. Pevner testified that from 1980 to 1988, plaintiff's income from his dental practice "averaged about . . . $40,000 a year" and that plaintiff had not earned any income in the two years preceding the trial. (T2, 81, 142). She also testified that plaintiff "lost interest in the dental office" and went to the office less frequently. (T2, 96). Plaintiff testified that the municipal prosecution caused him to "slow down" in his practice because of his inability to concentrate while treating patients. (T3, 50-52). In addition, a patient, Joan Kay, testified that plaintiff was not in his office as frequently and that he was "unavailable most of the time." (T3, 116, 122-23). Ms. Kay further testified that Dr. Pevner

had become aggravated, agitated and argumentative. (T3, 117-120).

Michael Lederer, plaintiff's long-time friend, testified that he and Dr. Pevner used to meet for breakfast up to six times per week for fifteen years and that they sometimes took vacations together. (T3, 107, 109). He testified that Dr. Pevner used to be happy, but that his mood had changed, "like Dr. Jekyll and Mr. Hyde." (T3, 110). Lederer testified that he first thought Dr. Pevner was "having a bad day, [b]ut then it started to be like . . . a bad day every day." (T3, 110). He stated that Dr. Pevner "[d]oesn't seem to trust any more." (T3, 110-11). Lederer does not enjoy Dr. Pevner's company anymore, and he "make[s] excuses not to meet him" for breakfast any more. (*Id.*)

Martin Kwait, another friend, testified that Dr. Pevner used to be friendly, sociable and jolly, but is no longer. (T3, 154-56). He testified that he noticed a change in Dr. Pevner's mood and demeanor about five years ago and that his condition is worsening. Kwait testified that Dr. Pevner would come into Kwait's store and "sit and sleep most of the time." (T3, 155). "He's gotten to the point where he'd come in and he'd be confused, and I'd have to call his wife to come over to get him because I would be afraid of him wandering around, not knowing where he was." (T3, 156). Dr. Pevner sometimes called Martin Kwait by the name "Danny," the name of Dr. Pevner's brother. (T3, 156).

Edward Thompson, Esquire, who represented Dr. Pevner and Mr. McGrath in the municipal court, testified

that, because Dr. Pevner was extremely agitated and concerned, he did not put him on the stand during the municipal court trial. (T2, 178-79). Attorneys' fees and costs for defending against the municipal prosecution totaled $4,300, (T2, 185), and attorneys' fees and costs for the appeal to the Superior Court totaled $7,540. (T3, 16). Thus, the total amount of attorneys' fees and costs from the municipal prosecution and appeal were $11,840.

Between 1989 and 1991, the plaintiff rented the Property for $12,000 for each summer season. Plaintiff's real estate appr4aiser, Edward Whitton, testified that the plaintiff could have rented the property for $18,800 during the [sic] each of the three summers for which he received citations. (T3, 41). Mr. Whitton also testified that the plaintiff could have rented the property for $1,800 a month during the winter seasons. (T3, 153). Based on this testimony, and the tax returns for the Partnership, (T3, 47-48), plaintiff's damages for loss of rental income totaled $42,140.

The City called only one witness, the Atlantic City Planning Director and Land Use Administrator, Jay Fiedler. He testified that he sent the May 17, 1994 letter in response to Dr. Pevner's application for a land use compliance certificate. (T4, 10; T3, 95-96). Fiedler's letter referenced the same section of the Ordinance that Judge Brathwaite had declared unconstitutional on June 7, 1991. (T4, 15). Fiedler testified that, although he was the City's Planning Director, he had not read the Judge's Order declaring portions of the Ordinance unconstitutional and that no discussion's were had in his office regarding the Judge's decision. (T4, 16-18, 21-22).

On March 22, 1996, after one day of deliberation, the jury returned a verdict awarding plaintiff $1,238,788.50. On April 4, 1996, the city filed a motion pursuant to Fed. R. Civ. P. 59(e) for a new trial on damages, or in the alternative, for remittitur of the jury verdict.

II. APPLICABLE LEGAL STANDARDS

Motions for a new trial on damages are governed by Federal Rule of Civil Procedure 59(a), which provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

F.R.C.P. 59(a); *Zarow-Smith v. New Jersey Transit Rail Operations, Inc.*, 953 F. Supp. 581, 584 (D.N.J. 1997). Although Rule 59 of the Federal Rules of Civil Procedure does not specifically enumerate the grounds for a new trial, court [sic] have generally granted a new trial where the verdict was the result of erroneous jury instructions,[5] was excessive or clearly unsupported by the evidence, or was

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[5] The City does not challenge the propriety of the jury instructions, nor could the City do so pursuant to Fed. R. Civ. P. 51 ("No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.") Atlantic City did not submit any proposed jury instructions to the court during the trial and did not object to any portion of the jury instructions before or after the court gave them.

influenced by extraneous matters such as passion, prejudice, sympathy or speculation. *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 197 (E.D. Pa. 1996); *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1186 (D.N.J. 1992) *aff'd*, 4 F.3d 1153 (3d Cir. 1993). Thus, a court is empowered to vacate a jury verdict and grant a new trial or remittitur where the jury's damage award is "so grossly excessive as to shock the judicial conscience" or is the product of passion or prejudice. *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 771 (3d Cir. 1987); *see also Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1038 (3d Cir. 1987) (court must "review a damage award to determine if it rationally based"); *Walters v. Mintec/Int'l.*, 758 F.2d 73, 82 (3d Cir. 1985) ("a district court should be alert to its responsibility to see that jury awards do not extend beyond all reasonable bounds").

A decision to grant a new trial or to order a remittitur is the type of decision that necessarily invades the province of the jury. Therefore, such an action is not to be undertaken lightly. The third Circuit reiterated the general principal that the scope of review of a damage award is "exceedingly narrow." *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1038 (3d Cir.1987). It is not a sufficient basis to reverse if we find only that an award is extremely generous, or that, had we been deciding, we "would have found the damages to be considerably less." *Id.; Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1230 (3d Cir. 1989). Rather, a district court's power to grant a new trial is limited to cases where "a miscarriage of justice would result if the verdict were to stand." *Olefins Trading Inc. v. Han Yang Chem. Corp.*, 9 F.3d 282, 289 (3d Cir. 1993); *Williamson v. Consolidated Rail Corp.*, 926 F.2d

1344, 1352 (3d Cir. 1991). The Third Circuit has recently explained that

> [T]his stringent standard is necessary to ensure that a district court does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts.

Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc) (internal quotations omitted); *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 596 (1977) (courts "should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injury and resulting disability shown as to shock [the court's] conscience and to convince [the court] that to sustain the award would be manifestly unjust"); *Taweel v. Starn's Shoprite Supermarket*, 58 N.J. 227, 231 (1971) ("Only when the record discloses clear and convincing evidence that 'plaintiffs' verdicts were so grossly excessive as to infect the entire result and to visit a manifest injustice upon the defendant if allowed to stand' is the remedy an entirely new trial.")[6] In reviewing a motion for a new

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[6] The Supreme Court observed that "the standard [for granting a new trial] has been variously phrased: 'Common phrases are such as: 'grossly excessive,' 'inordinate,' 'shocking to the judicial conscience,' 'outrageously excessive,' 'so large as to shock the conscience of the court,' 'monstrous,' and many others.' " *Grunethal v. Long Island R.R. Co.*, 393 U.S. 156, 159, 89 S. Ct. 331, 333, 21 L.Ed.2d 309 (1968) (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 802 (2d Cir. 1961).

trial, the court must " 'view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict.' " *Marino v. Ballestas*, 749 F.2d 162, 167 (3d Cir. 1984).

In the alternative, the City has moved for remittitur of the jury verdict in this case. Where no prejudicial error has been committed and "no 'pernicious influence' can be identified" but the size of the verdict is shocking to the court's conscience, the court may order a remittitur of the portion of the verdict greater than the amount supported by the evidence. *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983) (citations omitted); *Brunnemann v. Terra Int'l. Inc.*, 975 F.2d 175, 178 (5th Cir. 1992) (A remittitur may be granted if a jury's award is "excessive or so large as to appear contrary to right reason.") "Except in those cases in which it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there, the court may not arbitrarily reduce the amount of damages, for to do so would deprive the parties of their constitutional right to a jury trial." 11 Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2815 at 159 (1995) (citations omitted). If the court enters a remittitur in a stated amount, the plaintiff shall have the option of accepting the amount of the remittitur or submitting to a new trial. *Id.*; *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir.) (en banc), *cert. denied*, 510 U.S. 1031 (1993) ("[W]here the verdict is so large as to shock the conscience of the court, the appropriate action for the court is to order plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial.") With these narrow standards of

review in mind, we turn to the merits of the City's motions.

III. ANALYSIS

Defendant alleges that it is entitled to a new trial on damages because the jury's verdict bears no rational relationship to the evidence presented at trial and is so excessive that it must have resulted from passion or prejudice. The City alleges that the evidence presented by the plaintiff, if fully credited, supports an award of no more than $363,130.[7] In computing this amount, the City

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[7] Assuming that the jury credited the testimony submitted on behalf of the plaintiff in its entirety, the defendant argues that damages would be calculated as follows:

Attorneys fees (state courts):	$11,940
Lost rental income:	42,140
Medical (psychiatric) bills:	6,925
Anticipated future psychiatric care:	28,125
Lost income from work (1989-95):	274,000
TOTAL	$363,130

The plaintiff concurs with this calculation so far as it goes, but argues that the jury awarded $875,658.50 to compensate the plaintiff for pain and suffering.

The City argues that the plaintiff should not have been awarded all of the damages he sought for lost income from work. The City argues that the award presumes a total incapacity to work as a result of the City's actions, and that this presumption is contrary to the testimony indicating that the plaintiff continues to practice dentistry on a limited basis. The City's argument is unpersuasive. There was ample evidence at trial showing that the plaintiff would have earned $274,000 in income from his dental practice from 1989 to 1995, that he had no income from the dental practice for the two years prior to trial, and that he would continue to have no income from the

construes the past and future costs of psychiatric treatment and the lost income from the dental practice as representing the entirety of plaintiff's claim for damages due to emotional distress. (Defendant's Br. at 13). Plaintiff maintains that the jury credited the $363,130 in special damages demanded by the plaintiff, and that the balance of the verdict, $875,658.50, "was obviously intended to compensate Plaintiff for his pain and suffering, emotional distress, mental anguish, humiliation, loss of life's pleasures and harm to reputation proximately caused by Atlantic City's violation of his constitutional rights." (Plaintiff's Br. at 7).

We agree with the plaintiff that reimbursing him for past and future psychiatric care and for lost income does not fully compensate him for emotional distress. Although the defendant is correct in its assertion that emotional distress damages will not be presumed form the mere fact of a constitutional deprivation, we are satisfied that the jury weighed the credible evidence presented at trial and appropriately awarded compensation

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dental practice into the future. The plaintiff presented testimony and tax returns showing that he earned approximately $40,000 per year from his practice. The fact that the plaintiff practiced dentistry on a limited basis does not demonstrate that the plaintiff-derived income therefrom. To the contrary, Mr. Pevner testified that "the dental practice really went down the tubes" following the prosecution because "he showed no interest, no concern" and "didn't want to see new patients." (T2, 108). The defendant offered no testimony or documentary evidence from which a jury could reasonably find that the plaintiff derived or would derive any income from his practice during the relevant period.

to the plaintiff for the constitutional deprivation he suffered. *See Spence v. Board of Educ. of the Christina School District*, 806 F.2d 1198, 1203 (3d Cir. 1986) (Higginbotham, J., concurring) ("[A] legally compensable emotional distress claim, by its very definition, is one which, if proved, should entitle the claimant to *some* compensation. Put otherwise, the nature of an emotional distress claim is such that a finding that such harm in fact has occurred should be accompanied by some amount of damages.")

In reviewing a jury verdict for excessiveness, the court should consider whether or not the verdict is supported by the evidence presented at trial. The City argues that the evidence of emotional distress is speculative and could not support the jury's verdict. In support, the defendant relies on the third Circuit's decision in *Spence v. Board of Education of the Christina School District*, 806 F.2d 1198 (3d Cir. 1986). In *Spence*, the plaintiff alleged that she was transferred from her position as a high school art teacher to a position teaching art at an elementary school in retaliation for her exercising her First Amendment rights to free speech and free association. The jury awarded her $2,940 in increased traveling expenses and wage taxes, plus $22,060 for emotional distress. The trial judge ordered that the plaintiff accept remittitur of the award to $2,940 in compensatory damages, plus $3,500 in punitive damages, or submit to a new trial. The plaintiff refused to accept the remittitur, and a new trial was held. the jury returned a verdict in favor of the defendants finding that the plaintiff's exercise of her First Amendment rights was not a substantial or motivating factor in the decision to transfer her. The plaintiff appealed the district court's order remitting the jury's

verdict. The Third Circuit upheld the district court's order of remittitur, finding that the plaintiff did not submit sufficient evidence to prove that emotional injuries actually occurred or that they were caused by the defendant's conduct. The district court found that the award of damages for emotional distress were "wholly speculative given the limited quality and quantity of proof that plaintiff submitted on the issue." *Id.* at 1201. Specifically, the district court noted that:

> [t]he evidence of emotional distress consisted chiefly of plaintiff's own testimony that she was depressed and humiliated by the transfer and that she had lost her motive to be creative. There was no testimony that plaintiff's peers held her in any less esteem. In fact, Dr. Shurtleff, an art professor at the University of Delaware, testified that he continued to invite plaintiff to lecture at the University even after her transfer to the elementary school level. Plaintiff offered no evidence that she suffered physically from her emotional distress or that she sought professional psychiatric counselling. It is uncontraverted that plaintiff suffered no loss of job or reduction in pay.

Id.

The City also cites the case of *Perez v. Cucci*, 725 F.Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990), in support of its contention that Dr. Pevner's emotional distress damages are speculative. In *Perez*, a former Jersey City police officer brought suit pursuant to §§ 1983, 1985(3), and 1986 against the City of Jersey City and certain government officials for wrongfully demoting him from plainclothes detective to uniformed patrolman

because he had openly supported the candidacy of a mayoral incumbent who was defeated in his bid for reelection. After a fifteen day bench trial, Judge Ackerman found for the plaintiff, awarding him $4,298.05 in compensatory damages and back pay, $25,000 in punitive damages, plus attorneys' fees and reinstatement as a detective. Judge Ackerman found that the plaintiff's relocation to California coincided with, but was not caused by, the demotion. Thus, plaintiff was not entitled to compensation for the expenses of relocation. *Id.* at 256.

Judge Ackerman also denied an award of damages for emotional distress, finding that the constitutional violation did not cause the plaintiff's distress. Judge Ackerman noted that Perez experienced numerous stressful events during the relevant period, including sitting for the state bar examination more than once, going through a divorce, and seeking to be reunited with a child he had not seen in several years. Perez did not seek treatment for emotional distress during this period, and it was more than two and one half years after the defendants violated his constitutional rights that he sought psychiatric care. In addition, Judge Ackerman noted that Perez assumed a position with another police department immediately following the demotion, and he was able to function as an officer in an efficient manner. Upon return from California, Perez resumed his position with the Jersey City Police Department for more than one year, and he had later engaged in the practice of law. *Id.* at 227 n.19, 256.

The evidence in this case is stronger than the evidence presented in *Spence* and *Perez*. In *Spence*, the court found that "the evidence of emotional distress consisted chiefly of plaintiff's own testimony that she was

depressed and humiliated by the transfer and that she had lost her motive to be creative." 806 F.2d at 1201. Unlike the plaintiff there, Dr. Pevner offered not only his own testimony, but also the testimony of his wife, who described the changes she saw in her husband as a result of the citations and the municipal court prosecution. Mrs. Pevner testified extensively about her husband's optimistic mood and social activities prior to the municipal court prosecution and how his mood changed to depression and pessimism following the prosecution. She testified about his earlier dedication to his dental practice and the subsequent loss of interest in it, which continued until through the date of trial. She described the hobbies the plaintiff once enjoyed, their involvement in local civic organizations, and the frequent vacations they used to take. She testified that the plaintiff had little interest in their former activities, and that he broke appointments with patients, opting instead to sleep and to watch television. Joan Kay, one of the few patients Dr. Pevner continued to treat, testified about Dr. Pevner's dwindling interest in his dental practice, his failure to return telephone calls, and his argumentative mood following the municipal court prosecution.

The *Spence* court also noted the absence of testimony indicating that plaintiff's peers held her in less esteem. 806 F.2d at 1201. Here, the plaintiff offered testimony by two long-time friends, Michael Lederer and Martin Kwait, who stated that since the prosecution, they no longer enjoy seeing Dr. Pevner. Lederer testified that he used to enjoy being with the plaintiff, having breakfast with him several times per week and taking vacations together. Lederer likened his friend's mood change to

"Dr. Jekyll and Mr. Hyde." Lederer and Kwait each testified that Dr. Pevner often brought up the municipal prosecution, and that Dr. Pevner became angry and argumentative.

In *Spence*, the district court also pointed out that the plaintiff never sought professional psychiatric counselling despite her alleged emotional distress. 806 F.2d at 1201. Here, Dr. Pevner sought psychiatric care and his psychiatrist, Dr. Zibelman, testified regarding his diagnosis and treatment of the plaintiff. Dr. Zibelman diagnosed plaintiff as having an anxiety disorder characterized by anxiety, sleep impairment, an inability to concentrate, and snapping out at those around him. He also diagnosed Dr. Pevner as having a dissociative amnestic disorder characterized by loss of contact with the world in response to stress. These amnestic episodes were described by the plaintiff's wife and by Martin Kwait. Mrs. Pevner testified at length about the amnestic episode which occurred in August 1991 following their return from France. Mr. Kwait testified about the times when Dr. Pevner came into his store confused about where he was and about who Kwait was.

In *Perez*, Judge Ackerman noted that the plaintiff experienced numerous stressful events during the relevant period, including sitting for the state bar examination more than once, going through a divorce, and seeking to be reunited with a child he had not seen in several years. In light of these stressors and the long period between the violation and the time plaintiff first sought psychiatric treatment, Judge Ackerman found that the plaintiff failed to demonstrate that his emotional distress was attributable to the defendant's conduct. Here,

there was ample evidence from which the jury could conclude that the plaintiff's condition was directly attributable to the City's conduct. Several witnesses testified about the plaintiff's "obsessive" fixation on the prosecution, from 1989 when he first received the summonses through the prosecution itself and after his conviction was overturned on appeal. The plaintiff's psychiatrist testified that he independently diagnosed the municipal court prosecution as the cause of the plaintiff's emotional condition. He testified that he found no indication of any stress other than the municipal prosecution to which he could attribute the plaintiff's emotional state. Nor did the defendant elicit any testimony to the contrary. While it is true that speculative damages cannot be awarded in civil rights cases, *Bolden v. SEPTA*, 21 F.3d 29, 33 (3d Cir. 1994), we reject the defendant's contention that the plaintiff's evidence of emotional distress was so speculative that damages should not have been awarded. Accordingly, we find that the quality and quantity of the evidence presented at trial supports the jury's finding that the plaintiff suffered actual emotional distress as a result of the City's conduct.

The City further argues that the plaintiff failed to demonstrate that the damages for emotional distress were proximately caused by the City's violation of his constitutional rights. The City argues that the plaintiff's emotional distress, and in particular the plaintiff's reaction to the May 17, 1994 letter from the City, was highly extraordinary and thus not reasonably foreseeable. We find that the evidence presented at trial amply demonstrates that the plaintiff's emotional distress was proximately caused by the City's wrongful conduct.

The unrebutted testimony of Dr. Pevner, his wife, two long-time friends, and a dental patient demonstrate that the plaintiff experienced severe emotional distress throughout the period in which he received the summonses and continuing through the municipal court prosecution and appeal, and that the City's wrongful conduct was the proximate cause of the distress. The jury's finding that Dr. Pevner's emotional distress during the litigation was reasonably foreseeable is supported by the testimony of Dr. Pevner's municipal court attorney, Edward Thompson. Mr. Thompson testified that the City had assigned a Special Prosecutor to litigate this case because it was the "test case" for the constitutionality of the Ordinance. Thompson also testified that the mayor, a City Councilwoman, and the City Solicitor each attended at least one day of the municipal court trial. Mrs. Pevner testified about the publicity that the municipal court trial received. An October 25, 1990 article in the Atlantic City Press mentioned Dr. Pevner by name, stated that he was charged with more than 75 summonses, and described the case as a "somewhat precedent-setting case." (Exh. P-12). Dr. Pevner testified about the humiliation and anxiety caused by radio talk shows discussing his case. "People were calling in, calling us all kinds of names . . . It was humiliating." (T3, 94-95). He believed that "the whole City knew" about the criminal charges against him. (T3, 95). Based on this testimony, the court is satisfied that the City should have foreseen that the plaintiff would suffer emotional distress as a result of the issuance of the summonses and during the trial and the appeal.

The crux of the City's challenge to the jury's award of damages for emotional distress focuses on the plaintiff's

reaction to the City's May 17, 1994 and August 1994 letters.[8] The City argues that the City's violation of plaintiff's civil rights in 1991 was not the proximate cause of the plaintiff's emotional distress in 1994. However, the unrebutted testimony at trial showed that the plaintiff continued to experience anxiety, depression, mental anguish and emotional distress as a result of the prosecution from 1989 through 1994. When asked whether her husband's mood change continued even after being acquitted on appeal, Mrs. Pevner testified that it did not, that "the harm was already done" and "it had affected

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[8] The City's contention that this court erred in admitting testimony regarding the plaintiff's reaction to the May and August 1994 letters because it was highly inflammatory and unduly prejudicial to the City is without merit. The record shows that this court admitted the May 17, 1994 letter and testimony regarding plaintiff's reaction to its contents for the limited purpose of showing how the plaintiff perceived and reacted to it. From this testimony, the jury could determine whether the plaintiff reasonably believed that the City was "going to do it to [him] again" and whether the plaintiff's claims for emotional distress were proximately caused by the City's conduct. The court delivered the following limiting instruction:

> It is not the contention of the Plaintiff that the letter was an effort to pursue another violation of the Ordinance. The use of the letter is limited to show how Plaintiff perceived the letter. The validity or invalidity of the request contained in the letter is not the issue. It is Plaintiff's perception, that is the question.

(T2, 53-54). The language of this limiting instruction was stipulated to by counsel for the parties prior to its being given, and it was given to the jury several times (T3, 73-74, 101). The court finds that the limiting instruction was appropriately fashioned to avoid unfair prejudice to the City.

him." (T2, 107). Even after the Superior Court ruling, Dr. Pevner continued to "fear that it was going to recur again and that they were going to prosecute him again." (T2, 107). Dr. Zibelman explained why the plaintiff did not return to this former active and outgoing self following his acquittal:

> Sometimes the pathways of the brain are set by the stressful experiences. And in this case, those pathways of the anxiety symptoms and the depressive symptoms have been set. And, unfortunately, even though something happened apparently, later on in this case, he has not responded to that, and is still quite sick.

(T2, 215). Plaintiff's friends also testified regarding the changes they observed in the plaintiff and his mental condition since 1989. Michael Lederer testified that, although he had breakfast with the plaintiff approximately six days per week for fifteen years, he avoided seeing Dr. Pevner because of he had become argumentative, sullen and untrusting. (T3, 109-111). Martin Kwait described the plaintiff as depressed, confused, and disoriented. Kwait recounted several incidents where he called Mrs. Pevner to ask her to take her husband home because he worried about Dr. Pevner wandering around by himself in his confused state. (T3, 155-57, 160-61). Finally, one of Dr. Pevner's few remaining dental patients testified that Dr. Pevner had become angry, hostile, argumentative, and disinterested in his patients and his dental practice. Taken together, their testimony establishes that the plaintiff's mental state did not improve after June 1991, but rather continued through August 1994.

Based on this evidence, a reasonable jury could have concluded that the May 17, 1994 letter from Jay Fiedler exacerbated the pre-existing emotional problems that were precipitated by Atlantic City's prior wrongful conduct. Mrs. Pevner testified that, upon receipt of the letter, the plaintiff repeated "they're going to do it to me again" and "they're going to send me to jail" over and over again. (T2, 115-16).

Nor does the fact that the plaintiff waited until October 1994 to seek professional psychiatric care undermine the jury's determination that the plaintiff's emotional distress continued through the date of trial. Mrs. Pevner testified that she repeatedly urged her husband to see a psychiatrist, but that he refused to acknowledge that he needed help. (T2, 108-09, 159). Dr. Pevner stated that he resisted his wife's attempts to get psychiatric help because he thought he would "get out of it himself." (T3, 48-49). The August 1994 letters were the impetus which led Dr. Pevner to obtain professional help. The jury could reasonably have determined that the August 1994 episode was not an isolated incident, but was instead a manifestation of the underlying condition from which plaintiff suffered as a result of the City's actions. Accordingly, the court is satisfied that the plaintiff submitted sufficient evidence to prove that emotional injuries actually occurred and that they were proximately caused by the defendant's conduct.

In the area of damage's where there is a wide range of reasonable judgment, the law adds superlatives to assure that jury verdicts will not lightly be disregarded by trial courts. As we have stated above, setting aside a jury verdict as excessive is "proper only when the record

shows that the verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks the conscience." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991); *Hurley v. Atlantic City Police Dept.*, 933 F.Supp. 396, 403 (D.N.J. 1996). In other words, the question on review is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the judicial conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. Nevertheless, we must agree with the defendant that the verdict was so excessive in this case as to shock the judicial conscience. "A jury has very broad discretion in measuring damages; nevertheless a jury may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket. There must be a rational relationship between the specific injury sustained and the amount awarded." *Gumbs*, 823 F.2d at 773. In this case, we do not believe that $1,238,788.50 is within even the outermost limits of the range of reasonable and acceptable verdicts for the injury that the plaintiff suffered. We find, therefore, that it is excessive as a matter of law.

Although we find ample support in the record for an award of $363,130 in special damages,[9] we simply cannot

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[9] In *Grunenthal v. Long Island Railroad Company*, 393 U.S. 156 (1968), the Supreme Court noted that

> The trial record here has many unusual features, the most outstanding one being the noncontroversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted in toto its full

allow the jury's award of $875,658.50 for pain and suffering to stand. In so finding, we are cognizant of the limits of our authority to remit jury awards or to order a new trial. Remittitur cannot be ordered upon a finding that the jury's award was generously high or more than the court would have ordered it it was sitting without a jury. We find, however, that this jury verdict is not merely generous; it is excessive. The Third Circuit has held that "where no clear judicial error or 'pernicious influence' can be identified but where the verdict is so large as to shock the conscience of the court," the appropriate action for the court is to "order[ ] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983). There appearing no clear judicial error or 'pernicious influence' and this court having found the jury's award for pain and suffering to be excessive as a matter of law, we must determine the maximum sum that would reasonably compensate the plaintiff for the injuries he suffered. *Gumbs v. Pueblo International, Inc.*, 823 F.2d

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> significance and drawn such normal and natural inferences therefrom as the law endorses.

Id. at 158-59. This case is marked by the same unusual feature of evidence of damages standing essentially unrefuted. As in *Grunenthal*, the jury in this case was presented with a mountain of evidence tending to support a very large damage award and little to dissuade such an award. In fact, the defendant presented no witnesses to refute plaintiff's calculation of damages regarding attorneys fees, lost rental income, past and future medical bills or lost income from work, relying instead on cross-examination of the plaintiff's witnesses.

768, 774 (3d Cir. 1987); *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir.) (en banc), *cert. denied*, 510 U.S. 1031 (1993).

An analysis of the facts and evidence in the case, together with a comparison of the verdicts awarded in other cases,[10] demonstrates the excessiveness of the jury's award in this case. We first turn to an analysis of the evidence pertaining to the plaintiff's injury.

Dr. Pevner obviously led an active business and family life prior to the municipal prosecution. He is married and has raised three children who are professionals. He not only worked twelve hour days, six days per week in his community-based practice, but he was a boy scout troop leader, and an officer in his synagogue and in a local civic organization. He enjoyed opera and shared that interest with local high school students by taking them to the Metropolitan Opera in New York City when possible. He frequently met a friend for breakfast and he took vacations in Europe, where he had a timeshare condominium.

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[10] Courts focus primarily on the facts and evidence in the case at bar and examine the results of other cases only as a secondary measure. The examination of other cases is most often utilized to determine what a reasonable award should be for "pain and suffering" damages. Pain and suffering damages are unquantifiable; no expert, lay witness, document or photograph can assume to fix the amount that should be awarded for human anguish. Because the pain and suffering of each individual plaintiff is unique, comparisons with other awards may be helpful, but does not govern. The Third Circuit has utilized this analytical process. *See, e.g., Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 and n.19 (3d Cir. 1996).

As a result of the municipal prosecution, he became anxious and hostile. Both his professional and his social life suffered as a result. He refused to see new patients and the few patients he continued to see had difficulty scheduling appointments. He was no longer socially active. He did not want to go outside his home and his friends avoided visiting with him. The trial was attended by the mayor of Atlantic City, a City Councilwoman, and a Special Prosecutor. The municipal court trial was widely publicized on radio and in newspapers. He was convicted and sentenced to one year probation and a $3,000 fine. Four months later, the conviction was overturned on appeal. Even after his acquittal, he was afraid that the City would again prosecute him for violations of the Ordinance.

Plaintiff's wife repeatedly asked him to see a psychiatrist, but he refused. Then, in May 1994, the City requested additional information about an application for a Certificate of Land Use Compliance. The request included a reference to the provisions of the Ordinance which had been struck down by the Superior Court in 1991. Dr. Pevner had a strong emotional reaction to the letter, stemming from the municipal prosecution three years earlier.

Dr. Pevner and his wife traveled to France soon thereafter, but the plaintiff's mood did not change. Upon their return, they discovered a pile of envelopes from the City of Atlantic City. Dr. Pevner experienced an acute reaction to those letters. He threw the mail in the air, yelled, made strange noises, crawled on the floor, claimed that the was still in France and sang the nursery rhyme Frere Jacques. He spent five weeks at his daughter's

house trying to recuperate. Upon arrival there, he did not recognize his baby grandson. After that incident, Dr. Pevner has experienced approximately five other episode where he did not know where he was or the names of those around him.

Dr. Pevner first sought professional psychiatric care in October 1994. Dr. Zibelman diagnosed an anxiety disorder and an amnestic disorder. Although treatment had been ongoing for approximately one year before trial, Dr. Zibelman estimated that Dr. Pevner would need psychiatric care for five more years.

Next we turn to a survey of other Section 1983 cases to assist in making the determination of the maximum recovery without shocking the judicial conscience that a jury could reasonably have awarded the plaintiff under the circumstances. The defendant initially directs the court's attention to a series of civil rights actions brought against police offices who caused varying degrees of injuries during an arrest and argues that the injuries suffered by Dr. Pevner were less severe in nature and in the way the injury was inflicted. *Hogan v. Franco*, 896 F.Supp. 1313 (N.D.N.Y. 1995) (upholding $200,000 award to plaintiff who was denied medical treatment after being beaten during arrest, resulting in extended nerve damage and permanent loss of sensation in one hand, severe bruising where the police officers' batons struck him, abdominal pain, possibly permanent back injury from being tossed about the interior of the police van, fear of police, nightmares, flashbacks and cold sweats); *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31 (1st Cir. 1991) ($400,000 award to pregnant plaintiff who was beaten, handcuffed, placed face down on the floor of the police care, beaten again

and left to her cell without medical treatment remitted to $200,000); *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990) (estate of inmate awarded $175,000 for his death and pain and suffering when he was stabbed to death by a fellow inmate and prison guards stood by). Plaintiff counters with other Section 1983 cases against police officers where substantially higher verdicts were delivered. *See Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (plaintiff awarded $900,000 in compensatory damages where police officers used excessive force in making arrest, rupturing plaintiff's testicle and necessitating surgery resulting in removal of the testicle and sterility), *cert. denied*, 484 U.S. 1027 (1988); *Speller v. New York City Transit Authority*, 1988 WL 367151 (N.Y. Civ. Ct., Feb. 1988) (plaintiff awarded $750,000 where false arrest and assault by officers resulting in post-concussion syndrome, headaches, emotional distress and depression):

Plaintiff also undertakes a survey of other civil rights actions that more closely analogous to the facts of this case. In *Bolden v. SEPTA*, 21 F.3d 29 (3d Cir. 1994), the plaintiff was discharged for refusal to take a drug test and he was permitted to return to work only if he took the drug test. The jury's award of $250,001 was upheld by the Third Circuit Court of Appeals where the record revealed sufficient, though not compelling evidence of mental distress.

In *Gumbs v. Pueblo International Inc.*, 823 F.2d 768 (3d Cir. 1987), a jury awarded $900,000 for pain and suffering to a plaintiff who suffered injuries as a result of a slip and fall in the defendant's store. Plaintiff claimed that she had recurring pain and that she had to reduce her social

activities as a result. Her injuries required no hospitalization and she lost no time from work. She also claimed that her injuries caused discord in her marriage, eventually leading to divorce. The trial court remitted the award to $575,000, but the Third Circuit reversed in part by further remitting the award to $235,000.

In *Eckmann v. Board of Education of Hawthorn School District*, 636 F.Supp. 1214 (N.D. Ill. 1986), a school teacher who was wrongfully terminated for her out-of-wedlock pregnancy was awarded $2 million by the jury. The trial court remitted the award to $750,000, even though the plaintiff asked for only $500,000 in pain and suffering in her closing argument.

However, we find that this case is most analogous to the case of *Von Stein v. Brescher*, 696 F.Supp. 606 (S.D. Fla. 1988), *rev'd on other grounds*, 904 F.2d 572 (11th Cir. 1990). In that case, the managing agent of a shopping center brought a Section 1983 action against a sheriff and three deputies, alleging that he was arrested without probable cause for leasing his property with the knowledge that it was being used for purposes of prostitution. The defendants held Von Stein out as an example of a source of illicit activities in the community, and the incident was widely reported on television, radio and in the newspapers. The jury awarded $32,000 in special damages and $518,000 for mental suffering, humiliation, damage to his reputation, and emotional distress. The district court upheld the award, noting that "it is particularly difficult to quantify the sort of injury that the jury found Von Stein to have suffered." 696 F. Supp. at 616.

After careful review of the evidence presented at trial and the law relating to analogous injuries, we believe that the maximum recovery without shocking the judicial conscience that a jury could reasonably have awarded the plaintiff for pain and suffering, emotional distress, mental anguish, humiliation, loss of life's pleasures and harm to reputation would have been $500,000. As we have already stated, plaintiff is also entitled to $363,130 in special damages proven at trial. Thus, any award in excess of $863,130 is excessive and contrary to law. Accordingly, defendant's motion for remittitur or for a new trial will be granted. If the plaintiff refuses to accept remittitur of the award to $863,130, the court will direct that a new trial be conducted.

III. CONCLUSION

For the foregoing reasons, it is on this 12th day of May, 1997,

ORDERED that defendant's motion for remittitur of the jury verdict or for a new trial is *GRANTED*. Plaintiff is directed to accept a remittitur of the jury verdict to 863,130, representing $363,130 for special damages and $500,000 for pain and suffering, emotional distress, humiliation, and harm to plaintiff's reputation, or to submit to a new damages trial; and it is further

ORDERED that plaintiff shall inform this court within twenty (20) days of entry of this Order whether he accepts remittitur or if a new trial will be necessary.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

SIDKOFF, PINCUS & GREEN, P.C.
1847 East Marlton Pike (Rt. 70)
Cherry Hill, New Jersey 08003
(609) 579-7774

1101 Market Street
2700 Aramark Tower
Philadelphia, PA 19107
(215) 574-0600

By: Gary Green, Esquire
Robert A. Davitch, Esquire
Steven H. Griffiths, Esquire (SG-0339)
Attorneys for Plaintiff

MILTON PEVNER Plaintiff, v. CITY OF ATLANTIC CITY Defendant.	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION NO. 93-CV-2295 (JHR)

PLAINTIFF'S ACCEPTANCE OF REMITTITUR

Plaintiff, Milton Pevner, by his attorneys, Sidkoff, Pincus & Green, P.C., hereby informs the Court, in accordance with the Order entered on May 13, 1997, that he accepts remittitur of the jury verdict to $863,130, and waives a new trial on damages. In support thereof, Plaintiff further states that:

1. A copy of Plaintiff's written acceptance of the said remittitur, and of the remitted damages award in the amount of $863,130, is attached hereto as Exhibit "A";

2. Plaintiff requests entry of the remitted verdict, in the amount of $863,130 (exclusive of interest, attorney's fees and costs);

3. Plaintiff's acceptance of remittitur of the jury verdict to $863,130 is without prejudice to his rights to seek and recover prejudgment interest, attorney's fees and costs, which items are subject to motions presently pending before the Court; and

4. Plaintiff reserves also the right to seek and recover post-judgment interest pursuant to the applicable law and statute.

/s/ Steven H. Griffiths
GARY GREEN
STEVEN H. GRIFFITHS
ROBERT A. DAVITCH
Attorneys for Plaintiff

Dated: May 21, 1997

EXHIBIT A

May 15, 1997

Robert A. Davitch, Esquire
SIDKOFF, PINCUS & GREEN, P.C.
2700 Aramark Tower
1101 Market Street
Philadelphia, PA 19107

RE: Pevner v. City of Atlantic City
Civil Action No.: 93-CV-2295 (D.N.J.)

Dear Mr. Davitch:

I have been advised fully of the Court's Order and Opinion dated May 13, 1997, and hereby accept the Court's remittitur of the jury verdict to $863,130, and waive a new trial. I understand that I shall be bound legally by my action. Accordingly, you are directed to inform the Court of my acceptance of the remitted award of $863,130.

/s/ Dr. Milton Pevner
DR. MILTON PEVNER

Date: 5/16/97

SIDKOFF, PINCUS & GREEN, P.C.
1847 East Marlton Pike (Rt. 70)
Cherry Hill, New Jersey 08003
(609) 579-7774

1101 Market Street
2700 Aramark Tower
Philadelphia, PA 19107
(215) 574-0600

By: Gary Green, Esquire
Robert A. Davitch, Esquire
Steven H. Griffiths, Esquire (SG-0339)
Attorneys for Plaintiff

MILTON PEVNER Plaintiff, v. CITY OF ATLANTIC CITY Defendant.	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION NO. 93-CV-2295 (JHR) (Filed June 6, 1997)

ORDER RE: AMENDED CIVIL JUDGMENT

AND NOW, this 30th day of May, 1997, Plaintiff having accepted remittitur of the jury verdict to $863,130 in accordance with the Court's Order entered on May 13, 1997, and having waived a new trial on damages, it is hereby ORDERED and ADJUDGED that an AMENDED VERDICT for damages is hereby entered in favor of Plaintiff, Milton Pevner, and against Defendant, City of Atlantic City, in the amount of $863,130.

It is further ORDERED and ADJUDGED that Plaintiff's Motion to Amend and Increase Judgment Pursuant to Fed.R.Civ.P. 59(e) to include Prejudgment Interest is hereby GRANTED, and Plaintiff is hereby awarded, in addition to the said $863,130 remitted damages award, prejudgment interest in the amount of $131,404.83, thereby increasing the amount of the said verdict to $994,534.83. Accordingly, it is hereby ORDERED and ADJUDGED that an AMENDED JUDGMENT consisting of damages and prejudgment interest is hereby entered in favor of Plaintiff, Milton Pevner, and against Defendant City of Atlantic City, in the total amount of $994,534.83.

It is further ORDERED that this AMENDED JUDGMENT is without prejudice to Plaintiff's right to seek or recover attorney's fees, costs and post-judgment interest.

BY THE COURT:

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOSEPH H. RODRIGUEZ
JUDGE

1 JOHN F. GERRY PLAZA
P.O. BOX 886
CAMDEN, NEW JERSEY 08101
PHONE: 609-757-5002

May 30, 1997

Robert A. Davitch,
Esq.
Sidkoff, Pincus
& Green, P.C.
2700 Aramark Tower
1101 Market Street
Philadelphia, PA 19107

Mark F. Kluger
Esq.
Jasinski & Paranac,
P.C.
Ten Park Place
Newark, NJ 07102

Re: Milton Pevner v. City of Atlantic City
Civil Action No. 93-cv-2295 (JHR)

LETTER OPINION

(Filed Jun. 6, 1997)

Dear Counsel:

By letter dated May 21, 1997, plaintiff's counsel informed this court that the plaintiff has accepted remittitur of the jury verdict to $863,130, and is therefore waiving a new trial on damages.

Also pending before the Court is plaintiff's motion pursuant to Fed. R. Civ. P. 59(e) to amend the Judgment to include prejudgment interest. For the reasons set forth in this letter opinion, plaintiff's motion will be granted, and prejudgment interest in the amount of $131,404.83 will be awarded pursuant to 28 U.S.C. § 1961.

The plaintiff prevailed on his claims against the City of Atlantic City for violations of his rights under the Fourteenth Amendment and the New Jersey Constitution.[1] To the extent that the Judgment constitutes restitution for damages predicated on the violation of a federal statute (here, 42 U.S.C. § 1983), federal law applies. *Savarese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989) (" 'the availability of interest in an action arising under a federal statute is governed by federal law, not the law of the forum state.' "), quoting *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987). However, Section 1983 contains no provisions regarding the availability of prejudgment interest. In such circumstances, "a court may award prejudgment interest in accord with its equitable discretion." *Rao v. New York City Health & Hospitals Corp.*, 882 F. Supp. 321, 325 (S.D.N.Y. 1995).

Courts typically find that prejudgment interest should be awarded to a prevailing plaintiff in a Section 1983 action to effectuate the salutary purposes of the statute. *Rao*, 882 F. Supp. at 326 ("Prejudgment interest is usually a necessary component of any award intended to make a plaintiff whole, because it compensates a plaintiff

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[1] Where a plaintiff in a federal action prevails on both federal and state law claims, the federal and state law claims arise from the same facts, and prejudgment interest is available under both federal and state law, the plaintiff may elect to receive prejudgment interest under either federal or state law. *Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 931, 980 (D.N.J. 1994). It is unnecessary for the court to determine whether prejudgment interest is available under New Jersey law, as the plaintiff has elected to receive prejudgment interest under federal law, and as set forth more fully herein, prejudgment interest is available under the applicable federal law.

for delay in the receipt of relief."); *Golden State Transit v. City of Los Angeles*, 773 F. Supp. 204, 209 (C.D. Cal. 1991) ("The purpose of a § 1983 damages award is to compensate the plaintiff for injuries caused by the deprivation of constitutional rights. Prejudgment interest is an element of compensation, not a penalty.") (internal citation omitted); *De La Cruz v. Pruitt*, 590 F. Supp. 1296, 1309 (N.D. Ind. 1984) ("prejudgment interest serves to further the congressional purposes underlying Section 1983").

The City of Atlantic City argues that this court should exercise its discretion to deny prejudgment interest to the plaintiff because the jury rendered only a general verdict, which it argues gives rise to a presumption that the jury included prejudgment into its calculation of damages. The court rejects the City's assertion that the Judgment presumptively includes prejudgment interest. There is nothing in the jury's general verdict to suggest that it considered plaintiff's entitlement to prejudgment interest in arriving at their award. Indeed, the jury was not charged with respect to prejudgment interest; any the [sic] suggestion that the jury included prejudgment interest in its award is mere speculation.

The City further argues that the equities of this case militate against an award of prejudgment interest. In determining whether prejudgment interest should be awarded, courts in the Third Circuit have considered the following four factors: (1) the claimant's diligence in prosecuting the action; (2) whether the defendant has been unjustly enriched; (3) whether the award would be compensatory; and (4) other countervailing equitable considerations. *Feather v. United Mine Workers of America*, 711 F.2d 530, 540 (3d Cir. 1983).

The city argues that the plaintiff did not diligently prosecute this action, as the complaint was filed shortly before the statute of limitations ran. However, the City's argument fails to recognize that the plaintiff has not requested prejudgment interest from the date of the violation, but rather from the date the action was commenced. The City further asserts that it has not been unjustly enriched. Although the City correctly points out that it did not collect any fees or fines from the plaintiff in connection with its attempt to enforce the Ordinance, the City has been unjustly enriched to the extent that it has had use of the money that rightfully belonged to the plaintiff as compensation for the deprivation of his constitutional rights. *Feather*, 711 F.2d at 540 ("To the extent defendant has had the free use of the income producing ability of plaintiffs' money without having to pay for it, he has been unjustly enriched. To diverst [sic] the defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his."), quoting *Recent Developments – Prejudgment Interest as Damages: New Application of an Old Theory*, 15 Stan. L. Rev. 107, 109 (1962). Prejudgment interest compensates the plaintiff for the lost use of the money to which he was entitled.

Finally, the City argues that it would be inequitable to require the taxpayers of Atlantic City to shoulder the additional burden of a prejudgment interest award. The total amount of prejudgment interest is a function of the length of time it took this action to proceed to Judgment. The duration of this case was, to a significant degree, in the hands of the parties. A defendant, knowing that a

prevailing plaintiff may be entitled to prejudgment interest, has additional incentive to reach an amicable settlement at an early stage of the litigation. That a prevailing plaintiff might also be entitled to prejudgment interest should be a part of the defendant's calculation in deciding whether to reach a settlement or to proceed to trial. Furthermore, the City's first settlement offer was made on the day of trial. Having made the decision not to engage in pretrial settlement negotiations, the City of Atlantic City will not now be heard to complaint that the plaintiff is not entitled to compensation for the lost use of the funds during that period.

An appropriate Order amending the Judgment to reflect the plaintiff's acceptance of remittitur and the award of prejudgment interest will be entered.

Very truly yours,

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5405

MILTON PEVNER

v.

CITY OF ALTANTIC [sic] CITY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 93-cv-02295)

Present: Scirica, Roth, and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on January 29, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 6, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

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42 U.S.C. § 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the district of Columbia shall be considered to be a statute of the District of Columbia.

TRIAL TRANSCRIPTS

[p. 81] ELEANOR PEVNER – DIRECT – GREEN

A. THE PROFITS WERE GOING TO BE SHARED BETWEEN MY HUSBAND AND MR. MCGRATH.

Q. AND –

A. FOR HIM MANAGING IT AND RUNNING THE PROPERTY.

Q. AND HE PUT NO MONEY UP?

A. THAT'S RIGHT.

Q. AND WHAT WAS THE PURPOSE OF BEING SO GENEROUS TO MR. MCGRATH?

A. WHILE MY HUSBAND WAS BUSY RUNNING A DENTAL OFFICE, THAT WAS HIS, YOU KNOW, PRIME CONCERN AT THE TIME. AND HE JUST THOUGHT IT WOULD BE AN ADDITIONAL INCOME FOR ME THAT WAS FORTHRIGHT IN HIS MIND IF SOMETHING WOULD HAPPEN TO ME.

Q. OKAY. NOW –

A. OR TO HIM.

Q. DID YOU FILE JOINT TAX RETURNS WITH YOUR HUSBAND?

A. YES.

Q. AND DO YOU KNOW HOW MUCH MONEY DOCTOR PEVNER MADE FROM HIS DENTAL PRACTICE? AND I WANT YOU TO GO UP UNTIL – I WANT TO COVER THIS TIME PERIOD, I'M GOING TO GIVE

YOU, LET'S SAY, 1980 THROUGH 1988. IS THERE SOME NUMBER THAT HE NEVER MADE LESS THAN FROM THE DENTAL PRACTICE?

A. I WOULD SAY HE AVERAGED ABOUT UP TO ABOUT 40,000 A YEAR.

Q. IN THAT PERIOD, DID HE MAKE, EVER MAKE LESS THAN $40,000 PRIOR TO 1988, STARTING IN 1980?

* * *

[p. 96] ANYTHING. HE WOULD SIT AND BROOD OR SLEEP A LOT. STARTED TO WATCH T.V. A LOT.

Q. DID HE GO INTO WORK IN THE DENTAL OFFICE?

A. HE, HE WENT INTO THE DENTAL OFFICE, BUT NOT AS FREQUENTLY AS HE USED TO GO IN. HE JUST LOST INTEREST IN THE DENTAL OFFICE. HE WOULD BREAK APPOINTMENTS SOMETIMES. HE JUST LOST INTEREST IN EVERYTHING.

Q. NOW, THERE CAME A TIME WHEN THERE WAS AN ACTUAL TRIAL?

A. YES.

Q. AND THERE WAS A FINDING OF GUILTY?

A. RIGHT.

Q. AND THERE WAS A FINE AND A SUSPENSION AND A HALF A FINE?

A. RIGHT.

Q. WHAT WAS THE END RESULT? HOW MUCH WAS YOUR HUSBAND FINED?

A. I BELIEVE, I BELIEVE $3,000. I THINK THEY REDUCED THAT FINE. BUT I KNOW HE WAS PUT ON PROBATION.

Q. OKAY.

A. AND THAT WAS VERY UPSETTING TO HIM.

Q. AND THAT WAS A CRIMINAL TRIAL, WASN'T IT?

A. THAT'S RIGHT.

Q. HE WAS FOUND GUILTY?

A. NO. HE WAS FOUND NOT GUILTY.

Q. NO. GUILTY. I'M TALKING ABOUT THE FIRST TRIAL, CRIMINAL TRIAL.

* * *

[p. 142] MANY YEARS. HE DOESN'T SEE, HE DOES NOT HAVE A REGULAR BUNCH OF PEOPLE COMING IN. HE JUST HAS A FEW PEOPLE.

Q. YOU TOLD US THAT BEFORE THIS ACT BY ATLANTIC CITY, THE UNCONSTITUTIONAL ACT BY ATLANTIC CITY, THAT YOUR HUSBAND NEVER MADE LESS THAN $40,000 FROM HIS DENTAL PRACTICE?

A. TO MY KNOWLEDGE, YES.

Q. AND DID HE EVER MAKE $40,000 AGAIN?

A. NO.

Q. AFTER THE UNCONSTITUTIONAL ACT BY ATLANTIC CITY?

A. NO.

Q. DID HE MAKE ANYTHING LAST YEAR FROM THE DENTAL PRACTICE?

A. I THINK IT WAS A LOSS. I DON'T THINK HE MADE ANYTHING AT ALL THE LAST TWO YEARS.

MR. GREEN: THANK YOU, YOUR HONOR.

THE COURT: YOU MAY CROSS EXAMINE.

MISS AMANA: YES.

(CROSS EXAMINATION OF MRS. PEVNER BY MISS AMANA:)

Q. MRS. PEVNER.

A. YES.

Q. I'D LIKE TO DIRECT YOUR ATTENTION TO THE TIME SPENT IN ALLENTOWN. APPROXIMATELY HOW LONG WERE YOU AND YOUR HUSBAND IN ALLENTOWN AT YOUR DAUGHTER'S HOME?

A. I THINK ABOUT FIVE WEEKS, MAYBE SIX.

Q. APPROXIMATELY SIX WEEKS, FIVE TO SIX WEEKS?

* * *

[p. 185] THOMPSON – DIRECT – DAVITCH

MR. MCGRATH AND DOCTOR PEVNER?

A. YES. IT'S APPROXIMATELY $4300.

Q. AND WERE ALL OF THESE FEES AND COSTS PAID?

A. YES, THEY WERE.

Q. ARE YOU GENERALLY FAMILIAR WITH THE PREVAILING CHARGES FOR SIMILAR LEGAL SERVICES AND COSTS IN THE ATLANTIC CITY AREA FROM 1989 TO 1991?

A. YES.

Q. AND HOW DO THESE FEES AND COSTS COMPARE TO THOSE?

A. ACTUALLY MY GUESS IS THEY'RE PROBABLY BELOW WHAT THE AVERAGES ARE, BUT THEY ARE REASONABLE AS FAR AS WHAT THE –

Q. THAT'S MY LAST QUESTION. BASED ON WHAT YOU KNOW, DO YOU HAVE AN OPINION WITH REGARD TO WHETHER THESE FEES AND COSTS THAT YOU CHARGED ARE FAIR AND REASONABLE?

A. YEP, I DO.

Q. AND YOUR OPINION IS?

A. THAT THEY ARE FAIR AND REASONABLE.

MR. DAVITCH: ALL RIGHT, YOUR HONOR, I MOVE INTO EVIDENCE P-14.

THE COURT: P-14 IS IN EVIDENCE.

(PLAINTIFF EXHIBIT 14 WAS RECEIVED IN EVIDENCE.)

MR. DAVITCH: THANK YOU. I HAVE NO FURTHER QUESTIONS FOR MR. THOMPSON.

THE COURT: ALL RIGHT. MISS AMANA

(CROSS EXAMINATION OF MR. THOMPSON BY MISS AMANA:)

* * *

[p. 16] ZUBIN – DIRECT – DAVITCH

BEFORE, AND I BELIEVE THE TOTAL WAS SOMETHING IN THE ORDER OF 7,600 AND SOME DOLLARS. I DON'T HAVE THE EXACT FIGURE. AND I APOLOGIZE. I BELIEVE WE SUPPLIED THEM, AND WE DO HAVE THE BACKUP SHEETS TO EACH ONE OF THOSE.

Q. IF I WERE TO SUGGEST $7,540, WOULD THAT SOUND –

A. IT CERTAINLY SOUNDS REASONABLE. WHAT I CAN'T SEPARATE IS HOW MUCH OF THE TOTAL IT WAS, DUE TO COSTS. BECAUSE INCLUDED WITHIN THE LEGAL SERVICES AT $200 AN HOUR, THE TOTAL BILL WOULD HAVE REFLECTED THE TRANSCRIPTS AND ANY OUT-OF-POCKET COSTS THAT THE FIRM INCURRED, WE WOULD HAVE BILLED THEM TO DOCTOR PEVNER AND MR. MCGRATH AS WELL. BUT THOSE SHOULD BE REFLECTED.

Q. WELL, WERE ALL OF THESE BILLS PAID IN FULL?

A. TO THE BEST OF MY KNOWLEDGE, THE TOTAL BILL WAS PAID SOMETIME IN, I WOULD GUESS AUGUST OR SEPTEMBER OF 1991. ACCORDING TO THE BEST I CAN RECREATE FROM THE FILE, SINCE WE DON'T HAVE THE PRINTOUT OF THE BOOKKEEPING RECORDS, I WOULD BELIEVE THAT THE CHECKS WERE RECEIVED IN THE FALL OF 1991.

Q. CAN YOU TELL US WHETHER OR NOT THE FEES THAT YOU CHARGED TO MR. MCGRATH AND DOCTOR PEVNER, AND ANY COSTS THAT THEY INCURRED WERE REASONABLY AND NECESSARILY INCURRED IN CONNECTION WITH THE WORK THAT YOU DID IN OPPOSING THESE CRIMINAL CHARGES?

A. YES, SIR. I WOULD NEED TO EXPLAIN. DO YOU WANT ME TO EXPLAIN WHY?

* * *

[p. 41] PEVNER – DIRECT – GREEN

MORE THAN THREE PEOPLE PAYING RENT ON THE TALLAHASSEE AVENUE PROPERTY?

A. NEVER HAD MORE THAN THREE.

Q. AND DO YOU KNOW WHAT THE MOST MONEY YOU MADE FOR A SUMMER WAS, RENTING THAT PROPERTY TO NO MORE THAN THREE PEOPLE?

A. FOR THE SUMMER, THE MOST WE EVER MADE WAS 12,000.

Q. THAT'S RENTING TO THREE?

A. RENTING TO THREE.

Q. NOW, I WANT TO JUMP AHEAD NOW, IF YOU CAN, WITH ME. AND AFTER JUDGE BRATHWAITE ENTERED THE ORDER THAT SAID YOU COULD RENT TO MORE THAN THREE PEOPLE, WAS THERE ANY PROBLEM FINDING MORE THAN THREE PEOPLE TO RENT THIS BIG, EIGHT BEDROOM, FOUR BATHROOM HOUSE ON TALLAHASSEE?

A. WE HAD NO, NO PROBLEMS FINDING TENANTS. WE HAD TO TURN SOME AWAY.

Q. AND AFTER JUDGE BRATHWAITE ENTERED HIS ORDER, AND BEFORE YOUR WIFE, AS SHE TESTIFIED, TOOK OVER RUNNING THE TALLAHASSEE PROPERTY, DO YOU KNOW HOW MUCH MONEY YOU MADE IN THE SUMMER WHERE YOU COULD RENT TO MORE THAN THREE?

A. I KNOW THAT WE RENTED ONE SUMMER FOR, IT WAS AROUND $18,800. iN THAT, PLUS OR MINUS A HUNDRED.

Q. PLUS OR MINUS A HUNDRED. AND HOW MANY PEOPLE DID YOU RENT THAT EIGHT BEDROOM, FOUR BATHROOM HOUSE TO?

A. WE RENTED TO EIGHT.

* * *

[p. 47] SUSTAIN YOUR OBJECTION. BUT ON THIS ONE, I MEAN I THINK WE'RE WASTING A LOT OF TIME, IF IN FACT JUST TO BE ALERTED TO – DON'T MAKE REFERENCE TO SOMETHING THAT MAY CREATE A PROBLEM.

MR. GREEN: I DIDN'T ANTICIPATE ONE.

MISS AMANA: WELL, ONCE HE MOVES THEM, MOVE THEM, YOU KNOW, I WON'T OBJECT. THEY'LL BE IN.

THE COURT: ALL RIGHT. I JUST THINK WE'RE NOT PLAYING WITH WORDS. LET'S BE CAREFUL ON WHAT WE SAY WITH RESPECT TO THE PRETRIAL ORDER. BUT ON THESE, IF THERE'S NO OBJECTION, WHY DON'T YOU JUST MOVE THEM. WE'LL PUT THEM IN.

MR. GREEN: OKAY.

THE COURT: LET'S END IT.

MISS AMANA: THAT'S WHAT I'M SAYING.

THE COURT: ALL RIGHT.

MR. GREEN: THANK YOU, YOUR HONOR.

(SIDE BAR CONCLUDED)

MR. GREEN: YOUR HONOR, AND LET ME START BY MOVING IN PLAINTIFF'S EXHIBITS 42, 43 AND 44 INTO EVIDENCE.

MISS AMANA: NO OBJECTION, YOUR HONOR.

THE COURT: 42, 43 AND 44 ARE NOW IN EVIDENCE.

(PLAINTIFF EXHIBITS 24 [sic], 43 44 WERE RECEIVED IN EVIDENCE.)

MR. GREEN: THANK YOU.

Q. NOW, 42 IS THE 1065 UNITED STATES PARTNERSHIP RETURN OF INCOME FOR THE YEAR 1989, AND IT'S UNDER THIS HEADING THAT

* * *

[p. 50] PSYCHIATRIST BEFORE 1984 – OR '94, RATHER. AND THEY YOU WENT IN 1994. AND I JUST WANTED TO KNOW, I THINK THE JURY WANTS TO KNOW WHY DID YOU CHANGE YOUR MIND? WHY DID YOU SUDDENLY GO TO A PSYCHIATRIST, DOCTOR ZIBELMAN IN 1994?

A. WELL, IN 1994, I, I WAS JUST FOLLOWING EVERYBODY. I HAD NOTHING LEFT IN ME. I WAS REALLY OUT OF IT. AND I KNEW I WAS, I WAS – HAD AN ACCIDENT IN ANY DAUGHTER'S HOUSE, AND MY WIFE TELLS ME, I GUESS – I ASKED HER IF I NEEDED A DIAPER. IT WAS THAT BAD. I JUST DIDN'T KNOW, YOU KNOW. SO I JUST – SHE SAID GO TO SEE A PSYCHIATRIST, GO SEE MR. ZIBELMAN, DOCTOR ZIBELMAN. AND I JUST WENT. I WASN'T GOING TO FIGHT.

Q. TELL US, SIR, WHEN YOU DECIDED THAT YOU WERE NOT GOING TO TREAT PATIENTS IN YOUR DENTAL OFFICE, ABOUT WHEN WAS THAT?

A. WELL, I NEVER DECIDED I WASN'T GOING TO – I WAS GOING TO STOP TREATING THEM. I JUST SLOWED DOWN BECAUSE I STARTED TO LOSE CONFIDENCE IN MY CONCENTRATION, AND I WAS AFRAID I WAS GOING TO HURT SOMEBODY.

Q. DO YOU REMEMBER A DISCUSSION WITH YOUR WIFE THAT, GEES, I'M GETTING ANXIETIES

AND I'M GOING TO SEMI-RETIRE, AND WE'RE GOING TO SLOW DOWN BECAUSE WE CAN AFFORD TO, YOU KNOW, LIVE THE GOOD LIFE?

A. I WAS SAVING UP FOR THE '60S. I WANTED TO GET OUT AND DO THE THINGS THAT I COULDN'T DO BECAUSE OF THE KIDS AND EVERYTHING ELSE. SO I ENJOYED – DON'T GET ME WRONG, I LOVE [p. 51] MY CHILDREN. I HAD A GREAT TIME WITH THEM, BECAUSE THERE WAS TIMES THAT MY WIFE AND I NEEDED, AND THAT WAS WHAT WE WERE PREPARING FOR.

Q. DID YOU EXPECT TO RETIRE BEFORE AGE 65?

A. OH, NO.

Q. BY THE WAY, DID YOU PLAN THAT YOUR WIFE WOULD BECOME DISABLED WHEN YOU WERE ABOUT 59?

A. NO, I DIDN'T PLAN ON HER GETTING DISABLED.

Q. AND YOU WERE ABOUT 59 WHEN YOU STOPPED TREATING PATIENTS FULL-TIME, IS THAT CORRECT? 59 YEARS OLD?

MISS AMANA: OBJECTION, YOUR HONOR. THE WITNESS SAID THAT, MR. GREEN IS LEADING THE WITNESS INTO THAT.

THE COURT: ALL RIGHT, PERHAPS ASK HIM MORE GENERAL QUESTIONS.

MR. GREEN: ALL RIGHT.

Q. HOW OLD ARE YOU NOW, SIR?

A. I'M 67.

Q. SIXTY-SEVEN. SO IF WE GO BACK TO 1989 –

A. WELL –

Q. – THAT WOULD BE – WE'RE GOING TO TAKE OFF EIGHT YEARS. AM I RIGHT? NOW, WHEN DID YOU STOP, WHEN DID YOU LOSE YOUR CONFIDENCE ABOUT TREATING PATIENTS? ABOUT WHAT YEAR?

A. I STARTED LOSING – WHEN I STARTED LOSING CONFIDENCE IN MYSELF, WHEN I FELT THAT –

[p. 52] Q. WHEN? WHEN? WHEN, SIR?

A. IT WAS, IT STARTED 1988, 89.

Q. DID IT START BEFORE OR AFTER YOU RECEIVED THE NOTICES THAT YOU WERE VIOLATING THIS ORDINANCE?

A. OH, IT STARTED WHEN I STARTED TO GET THOSE VIOLATIONS, CRIMINAL NOTICES GETTING –

Q. AND WHEN YOU GOT THE NOTICES, JUST SO WE CAN – SO I'M NOT THE ONE WHO IS TESTIFYING, WERE YOU YET 60, OR WERE YOU STILL BELOW 60?

A. I WAS JUST BELOW 60 AT THAT TIME.

Q. HAD YOU MADE A DECISION THEN THAT YOU WERE GOING TO RETIRE THAN AT 60? OR SEMI-RETIRE AT 60?

A. I LOVE DENTISTRY. I WASN'T GOING TO RETIRE.

Q. DID YOU DISCUSS WITH YOUR WIFE THAT YOU WERE GOING TO RETIRE AT ANY TIME BEFORE AGE 65?

A. NO.

Q. OKAY. I'M REMINDED OF ONE OTHER AREA THAT WE SHOULD CLARIFY. DO YOU KNOW WHAT A C.O. IS?

A. OH, YEAH.

Q. IS THAT A CERTIFICATE OF OCCUPANCY?

A. THAT'S RIGHT.

Q. DO YOU HAVE TO FILE A CERTIFICATE OF OCCUPANCY?

A. YOU HAVE TO FILE ONE EVERY TIME SOMEBODY MOVES IN OR MOVES OUT. SOMEBODY –

Q. AND WHAT IS THE RELATIONSHIP, IF ANY, BETWEEN THE NUMBER

* * *

[p. 116] KAY – DIRECT – DAVITCH

THEY WENT THROUGH THE BRACES GAME AND THE CAVITY SCENE, AND SO WE WERE THERE QUITE A BIT.

Q. DID THAT EVER CHANGE?

A. UH, YES. IN RECENT YEARS IT HAS CHANGED. MY CHILDREN HAVE GROWN. OF COURSE, THEY HAVE SOUGHT OTHER DENTISTS, MAINLY BECAUSE IT WAS – OR DOCTOR PEVNER WAS NOT IN HIS OFFICE AS FREQUENT. HE WAS

UNAVAILABLE MOST OF THE TIME. HE JUST DIDN'T SEEM TO CAR ABOUT DENTISTRY ANYMORE.

Q. WHEN DID YOU FIRST START NOTICING THAT?

A. I CAN'T BE EXACT. BUT I WOULD SAY – THIS IS '96? BE ABOUT FIVE, SIX, SEVEN YEARS AGO. SOMETHING LIKE THAT.

Q. HOW OFTEN DID YOU SEE DOCTOR PEVNER AS A PATIENT FROM THE MID '60S UNTIL THE LATE '80S?

A. ARE YOU TALKING ABOUT ME, PERSONALLY?

Q. YES.

A. QUITE OFTEN. I WOULD HAVE A PROBLEM WITH MY TEETH AND MY GUMS. IT WAS A HEREDITARY THING. SO I WAS QUITE OFTEN. PROBABLY WAS ONE OF HIS BETTER PATIENTS.

Q. HOW OFTEN DID YOUR CHILDREN SEE HIM DURING THAT SAME TIME FRAME?

A. THE AVERAGE TIME THAT CHILDREN GO TO THE DENTIST. LIKE MAYBE A LITTLE BIT MORE WHEN THEY HAVE BRACES ON THEIR TEETH, BECAUSE THEY HAD TO GO OFTEN FOR ADJUSTMENTS AND WHATEVER. THE NORMAL TIMES THAT A CHILD SEES A DENTIST.

Q. DURING THE COURSE OF YOUR DENTIST-PATIENT RELATIONSHIP

* * *

[p. 121] KAY – CROSS – AMANA

Q. MRS. KAY.

A. YES.

Q. MY NAME IS CARYL AMANA. I REPRESENT THE CITY OF ATLANTIC CITY. GOOD AFTERNOON.

A. HI.

Q. HI.

A. GOOD AFTERNOON.

Q. DO YOU RECALL THE LAST TIME YOU WERE IN DOCTOR PEVNER'S DENTAL OFFICE?

A. OH, YES.

Q. WHEN WAS THAT?

A. LAST SUNDAY MORNING.

Q. YOU WERE THERE FOR HIS PROFESSIONAL SERVICES?

A. YES. I HAD TO HAVE SEVERAL TEETH EXTRACTED.

Q. DOES DOCTOR PEVNER HAVE ANY EMPLOYEES IN HIS OFFICE?

A. NO.

Q. WERE YOU CONTINUING TO GO TO HIS OFFICE? WERE YOU A PATIENT OF HIS FROM 1989 UNTIL LAST SUNDAY?

A. YES.

Q. DID DOCTOR PEVNER HAVE ANY EMPLOYEES?

A. NO.

Q. BEFORE 1989, WERE YOU A PATIENT OF HIS?

A. YES.

Q. DID HE HAVE ANY EMPLOYEES THEN?

A. HE HAD, YES, A DENTAL HYGIENIST. I DON'T KNOW THE YEAR

* * *

[p. 137] WHITTON - DIRECT - DAVITCH

WOULD BE - I DON'T HAVE A SPECIFIC DATE, BUT WE ALLOWED EIGHT MONTHS WHERE WE CONSIDERED WINTER RENTAL.

Q. LET'S FOCUS ON THE SUMMER. DO YOU HAVE AN OPINION WITHIN A REASONABLE DEGREE OF PROFESSIONAL CERTAINTY WITH REGARD TO THE POTENTIAL INCOME THAT COULD HAVE BEEN EXPECTED TO BE RECEIVED FROM THIS PROPERTY DURING EACH SUMMER SEASON FROM '89 TO '91, ABSENT THE ORDINANCE?

A. WELL, FROM OUR HARD ANALYSIS OF THIS PROPERTY, WE DETERMINED THAT 18,800 WOULD BE A SUMMER SEASON GROSS RENTAL FOR THIS TYPE OF A PROPERTY. CONSIDERING THE LOCATION, ITS DESIRABILITY, VACANCY IN THE AREA, THAT THAT WOULD HAVE BEEN A PROBABLE INCOME DURING THE SUMMER SEASON.

Q. WOULD THAT BE 18,800 FOR EACH OF THE THREE SUMMER SEASONS FROM '89 TO '91?

A. YEAH. THE RENTALS THAT WERE DETERMINED REMAINED CONSTANT ALL THROUGH THAT TIME.

Q. TELL US, IF YOU WOULD, WHAT PROCESS YOU FOLLOWED TO ARRIVE AT THAT FIGURE, 18,800?

A. WELL, WE DETERMINED THE GROSS INCOMES OF OTHER RENTAL HOUSING ON A TOTAL PROPERTY BASIS. THEN WHAT WE DID, ISOLATED THOSE PARTICULAR PROPERTIES, WE MADE ADJUSTMENTS FOR LOCATION. SOME, WE DETERMINED FROM THE CONVERSATIONS WITH BROKERS AND PEOPLE WHO ACTUALLY RENTED PROPERTIES, THE DIFFERENCE FROM – IF YOU'RE ON THE BEACH AND YOU'RE A BLOCK UP FROM ATLANTIC AVENUE, GOING FURTHER TOWARD, AWAY FROM THE

* * *

[p. 153] WHITTON – RECROSS – AMANA

FOR SUMMER SEASON, $2,350 TIMES EIGHT BEDROOMS, CORRECT?

MR. DAVITCH: I OBJECT TO THE STATEMENT, THAT'S PRETTY OBVIOUS. SHE'S TESTIFYING.

Q. LET ME REPHRASE IT. YOUR ANALYSIS IS BASED ON A GROSS RENTAL OF $2,350 TIMES EIGHT BEDROOMS FOR THE SUMMER SEASON, CORRECT?

A. THAT'S CORRECT.

Q. AND YOU ANALYSIS ALSO STATES THAT IN THE OFF SEASON, $225 PER MONTH PER ROOM COULD BE OBTAINED, THEREFORE, $225 TIMES EIGHT BEDROOMS, OR $1,800 PER MONTH FOR THE OFF SEASON?

A. THAT'S CORRECT.

Q. THANK YOU.

MR. DAVITCH: NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT. THANK YOU, MR. WHITTON. YOU'RE EXCUSED.

(WITNESS EXCUSED)

THE COURT: PLAINTIFF'S NEXT WITNESS?

MR. DAVITCH: WE HAVE MARTIN KWAIT. PLAINTIFF CALLS MARTIN KWAIT.

(MARTIN KWAIT WAS DULY SWORN AND TESTIFIED AS FOLLOWS:)

(DIRECT EXAMINATION OF MR. KWAIT BY MR. DAVITCH:)

THE WITNESS: MARTIN KWAIT.

Q. GOOD AFTERNOON, MR. KWAIT. COULD YOU TELL US WHERE YOU LIVE, PLEASE?

* * *

Supreme Court, U.S.
FILED

97-1937 MAY 8 - 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

CITY OF ATLANTIC CITY,

Petitioner,

v.

MILTON PEVNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL APPENDIX

MARK F. KLUGER
Counsel of Record
KAREN M. WILLIAMS
JASINSKI and PARANAC, P.C.
Ten Park Place
Newark, New Jersey 07102
(973) 824-9700

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5405

MILTON PEVNER

v.

CITY OF ATLANTIC CITY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 93-CV-02295)
District Court Judge: The Honorable
Joseph H. Rodriguez

Submitted Under Third Circuit LAR 34.1(a)
January 29, 1998

Before: SCIRICA, ROTH, AND RENDELL, *Circuit Judges*

(Opinion Filed: FEB 9 1998)

MEMORANDUM OPINION OF THE COURT

RENDELL, *Circuit Judge*:

This appeal requires us to determine whether the district court abused its discretion in denying a motion for new trial, granting a remittitur, and awarding pre-judgment interest to the plaintiff in a civil rights action brought pursuant to 42 U.S.C. § 1983. Because we find

that the lower court acted well within its discretionary function, we will affirm.

I. FACTUAL BACKGROUND

In 1988, Appellee Dr. Milton Pevner ("Dr. Pevner") and his business associate, Frank McGrath ("Mr. McGrath"), purchased five properties in a residential district of Atlantic City, New Jersey, intending to rent the properties to vacationers in order to earn additional income. However, these plans were thwarted when, beginning in the spring of 1989 and continuing until June 1991, Appellant, the City of Atlantic City, New Jersey, ("Atlantic City" or "the City"), filed more than sixty criminal charges against Dr. Pevner and Mr. McGrath for violations of a local zoning ordinance ("Ordinance") that had been in effect since 1980. That Ordinance prohibited more than three persons unrelated by blood from living together in a single home in certain residential districts. The City contended, *inter alia*, that four or more unrelated persons had been occupying one of the properties owned by Dr. Pevner and Mr. McGrath at various times between 1989 and 1990. Dr. Pevner and Mr. McGrath denied the allegations and pled not guilty to the City's charges.

Three days of hearings on the accusations were conducted in municipal court between October 1990 and February 1991, and on February 15, 1991, the court found Dr. Pevner and Mr. McGrath guilty on all charges, sentencing them to probation and ordering them to pay fines totaling $3,100.

Dr. Pevner and Mr. McGrath appealed to the Superior Court of New Jersey, Criminal Division, and by Order

dated June 7, 1991, the Superior Court reversed their convictions and declared certain provisions of the 1980 Ordinance unconstitutional. The court found that "there was insufficient, credible admissible evidence" to sustain the guilty verdicts, and it held that the Ordinance itself violated substantive due process under the Fourteenth Amendment and the New Jersey Constitution by placing unreasonable restrictions on the right to use and rent real property. The City did not appeal or request reconsideration of this ruling.

Subsequently, on May 27, 1993, Dr. Pevner and Mr. McGrath filed the instant action under § 1983 against Atlantic City, alleging that the City's efforts to convict them under the invalid zoning statute violated the United States and New Jersey constitutions and caused them severe emotional and psychiatric distress.[1] The district court granted Dr. Pevner's motion for summary judgment by Order dated December 29, 1994, and a jury trial for damages was conducted between March 18 and March 21, 1996. After a single day of deliberations, the jury returned a verdict of $1,238,788.50 in favor of Dr. Pevner. On April 4, the City filed a motion for new trial, or in the alternative, for remittitur of the jury's verdict, and on May 12, 1997, the district court granted the motion in part, and reduced the jury's award to $863,130, an amount which Dr. Pevner later agreed to accept. Finally, in a Letter Opinion dated May 30, 1997, the district court granted Dr. Pevner's motion for prejudgment interest pursuant to 28

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[1] Mr. McGrath assigned his interest in the § 1983 litigation to Dr. Pevner shortly before passing away. Thus, Dr. Pevner is the only remaining plaintiff's/appellee.

U.S.C. § 1961, adding $131,404.83 to the verdict already entered against Atlantic City.

The City now appeals the denial of the motion for new trial, the size of the remittitur that was granted, and the award of prejudgment interest to Dr. Pevner. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

II. STANDARDS OF REVIEW

We begin by emphasizing the limited nature of our review and the broad discretion which we accord to the lower courts to decide motions for new trial, remittitur, and prejudgment interest. A trial judge is in the best position to weigh the evidence, evaluate the credibility of witnesses, and ultimately determine the propriety of a jury's verdict. Therefore, as we have consistently maintained, "the scope of this court's review of a damage award is exceedingly narrow. We may grant a new trial or remittitur only if the verdict is so grossly excessive as to shock the judicial conscience." *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1039 (3d Cir. 1987) (internal quotations omitted); *see also Gumbs v. Pueblo Intern, Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (stressing our "severely limited" role in reviewing a trial court's decisions on motions for new trial and remittitur). We may review a verdict to ensure that it is rational, *Williams*, 817 F.2d at 1038, but we will not disturb a district court ruling on the adequacy of damages "unless a 'manifest abuse of discretion' [is] shown." *Semper v. Santos*, 845 F.2d 1233, 1236 (3d Cir. 1988) (quoting *Edynak v. Atlantic Shipping Inc. CIE, Chambon Maclovia S.A.*, 562 F.2d 215, 225-26 (3d Cir. 1977)). Similarly, "we may disturb the district court's

determination with respect to a remittitur only for abuse of discretion," *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996) (quoting, *Gumbs*, 823 F.3d at 771), and our review of an award of prejudgment interest is, likewise, limited to abuse of discretion *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992).

In addition, two other considerations give us pause. First, where, as here, the district court has already granted remittitur, we must give "additional deference" to the judge's decision. *Delli Santi*, 88 F.3d at 206. As the First Circuit has written, when the damages awarded by the jury have already been subjected to thorough scrutiny by the trial court, "and the sum that the defendant will ultimately have to pay does not exceed the outermost total which . . . could fairly be said to flow from the evidence adduced at trial, the court of appeals has no warrant to insist upon a retrial or to reduce the award still further." *De Leon Lopez v. Corporacion Insular De Seguros*, 931 F.2d 116, 126 (1st Cir. 1991). To do otherwise would invade the province of the jury while undermining respect for the trial court.

Second, we are even more hesitant on appeal to reverse a factual determination regarding pain and suffering or emotional distress. "Evidence of pain and suffering is particularly ill-suited to review upon only a written record," *Edynak*, 562 F.2d at 227 n.16, for evaluations of witness credibility and demeanor are especially critical to determining the merits of a litigant's claims. Therefore, where, as in this case, the crux of the action involves emotional and psychological damages, we believe the ultimate decision should remain with the jury and the trial judge absent an abuse of discretion. *Kerzner*

v. Global Upholstery Co., Ltd., No. CIV. A. 95-1209, 1997 WL 727692, at *1 (E.D. Pa. Nov. 19, 1997).

III. DISCUSSION

With these principles in mind, we see no reason to upset the ruling of the lower court in the case at bar. The City's contention that the district court judge abused his discretion in ruling on the motions for new trial, remittitur, and prejudgment interest fail to demonstrate why we should invade the province of the jury and the trial court to alter the verdict that has been entered in Dr. Pevner's favor.

A. The Motions for New Trial and Remittitur

The City begins by arguing that the district court abused its discretion in failing to grant a new trial on damages and/or to remit the jury's verdict to an amount bearing a rational relationship to the evidence. In particular, it contends (1) that the evidence did not support compensating Dr. Pevner for emotional distress; (2) that the evidence did not support awarding Dr. Pevner relief for lost income; and (3) that, even if Dr. Pevner was entitled to these damages, he should have received no more than the $363,180 in out-of-pocket damages which he substantiated at trial. For the reasons that follow, we disagree.

1. *Emotional Distress Damages*

The City first contends that Dr. Pevner should not have received compensation for emotional distress

caused by the 1989-1991 prosecution, because the evidence of emotional distress damage was to speculative, and because Dr. Pevner failed to prove that his emotional distress was proximately caused by the City's violation of § 1983. Both parties acknowledge that the jury awarded damages based on evidence presented at trial of $363,130 of out-of-pocket special damages suffered by Dr. Pevner.[2] Of this total, $309,050, or nearly 85%, of Dr. Pevner's asserted losses were allegedly the product of the emotional and psychiatric distress caused by City's failed prosecution. However, the City maintains that the evidence presented at trial was too speculative to support a verdict for these emotional claims. *See, e.g., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir. 1988) (stating that "speculative damages will not be awarded" in civil rights cases). In addition, it argues that there is insufficient evidence of a causal link between the City's prosecution and any emotional damages that Dr. Pevner may have suffered.

We find, however, that the district court did not abuse its discretion by denying a new trial or granting a

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[2] The damages were calculated as follows:

Attorneys' fees for the state court prosecution:	$11,940
Lost rental income from the properties in Atlantic City:	42,140
Medical/psychiatric bills:	6,925
Anticipated future psychiatric care:	28,125
Lost income from work (1989-1995):	274,000
TOTAL:	$363,130

larger remittitur on these grounds. First, there is ample evidence in the record from which a rational jury could have concluded that Dr. Pevner suffered emotional damages in the amount that he has claimed. Eleanor Pevnor ("Mrs. Pevner"), Dr. Pevner's wife, testified that Dr. Pevner became depressed, pessimistic, and socially inactive as a result of the municipal prosecution. (Joint Appendix ("JA") at 245.) Dr. Robert Zibelman ("Dr. Zibelman"), the psychiatrist who treated Dr. Pevner after the manifestation of his depression and anxiety, observed that Dr. Pevner was nervous and upset, had withdrawn from his friends, and had developed a dissociative amnestic disorder characterized by loss of contact in response to stress. (JA at 358-65.) He further noted that Dr. Pevner had experienced a "traumatic change in his whole life" that would require psychiatric care "for a number of years." (JA at 364, 367.) Additionally, Michael Lederer ("Mr. Lederer") and Martin Kwait ("Mr. Kwait"), two of Dr. Pevner's closest friends, stated under oath that Dr., Pevner had completely changed, "like Dr. Jekyll and Mr. Hyde," (JA at 493), into a confused individual who seemed out-of-touch with reality. (JA at 539.)

Thus, the jury's decision to award Dr., Pevner emotional damages was clearly within the bounds of reason. This court had been willing to reject a claim of emotional distress where there is insufficient evidence to support a rational verdict. *See, e.g., Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198 (3d Cir. 1986) (affirming a remittitur where plaintiff presented no testimony from her peers and no evidence of lost income or psychological

counseling). However, where, as here, there is uncontradicted testimony from the plaintiff, his wife, his psychiatrist, and his friends, all confirming the psychological and emotional changes in his life after the City's prosecution, we are in no position on appeal to declare that the district court abused its discretion by acting as it did. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29 (3d Cir. 1994) (testimony of friends, family, and psychological damages sufficient to sustain the jury's award for emotional damages).

Likewise, we do not believe that the judge erred in finding that there was sufficient evidence of causation to support Dr., Pevner's emotional distress claims. In order to collect compensatory damages in a § 1983 action, a plaintiff must prove that a constitutional deprivation actually caused a tangible injury. *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Here, the City argues that there was no causation because "the most significant and dramatic testimony regarding emotional distress involved events which occurred long after the City's § 1983 violations had ceased." (City Br. at 27.) Indeed, the testimony at trial established that Dr. Pevner's most palpable emotional reactions occurred in 1994, three years after the City's prosecution had ended. Dr., Pevner became more withdrawn after receipt of a May 17, 1994, letter from the City indicating that he was about to be prosecuted under the same unlawful ordinance for which he had been cleared (JA at 265); he had a bizarre emotional reaction after receiving additional letters from the City in August 1994 (JA at 277-79);[3] and he sought psychiatric assistance with

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[3] The City's contention that the district court improperly admitted evidence of Dr. Pevner's reactions to these 1994 letters

Dr. Zibelman for the first time in October 1994. (JA at 351.) Thus, the City claims, there is no evidence that the distress giving rise to Dr. Pevner's claim was caused by the City's prosecution, which had ended three years earlier in 1991.

However, the record does contain extensive evidence from which a reasonable jury could have found proximate causation. As the district court documented, "the unrebutted testimony at trial showed that [Dr. Pevner] continued to experience anxiety, depression, mental anguish and emotional distress *as a result of the prosecution* from 1989 through 1994" even though his charges with the City had been resolved by 1991. (JA at 113; emphasis added.) Mrs. Pevner, Mr. Lederer, Mr. Kwait, and Dr. Zibelman all stated under oath the Dr., Pevner's condition worsened from 1989 through 1994, and that his stress was caused by and directly related to the strain of the prosecution initiated by the City. (JA at 363.) Dr. Zibelman even testified that "there were *no* other stressors that I could determine that would cause these symptoms" other than the city's wrongful conduct. (JA at 379; emphasis added.) Therefore, a reasonable jury could have found that Dr., Pevner's emotional reaction in 1994 was not the result of any unrelated incident, or a distinct and

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is unavailing. The district court admitted the letters for the limited purpose of showing how the plaintiff perceived and reacted to then [sic], and expressly gave the jury a limiting instruction to this effect. (JA at 203-04.) The limiting instruction was stipulated by both counsel and was read to the jury several times. (JA at 223.) Thus, there is no reason to believe that these letters created the type of danger or prejudice that would have warranted their exclusion.

separate cause in and of itself, but was, rather, the manifestation of a chronic, underlying emotional disorder which had continued unabated since the City first charged Dr., Pevner with a violation of the zoning ordinance in 1989.[4]

2. *Lost Income Damages*

The City next contends that Dr. Pevner presented insufficient evidence to support his claim for damages from lost income. At trial, Dr. Pevner sought $274,000 in relief resulting from the loss of income from his dental practice, including $40,000 in lost income per year from the commencement of the City's prosecution in 1989 until he reached the age of sixty-five. The City, though, argues that while the money that Dr. Pevner sought for lost income presumed a total incapacity to work, the evidence showed that Dr. Pevner actually practiced dentistry on a limited basis after 1989. Therefore, it maintains that Dr. Pevner was not entitled to collect any damages for lost income because he was always capable of working.

We disagree. As the district court found, "[t]here was ample evidence at trial showing that [Dr. Pevner] would have earned $274,000 in income from his dental practice from 1989 to 1995, that he had no income from the dental

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[4] The City's argument that Dr. Pevner's reactions in 1994 were too irrational, and thus not compensable, are also without merit. On this record, a jury certainly could have found that Dr. Pevner would reasonably suffer emotional distress upon receipt of the City's letters, especially in light of the uncontradicted evidence showing that Dr. Pevner was suffering from continuous psychological traumas throughout the 1990's.

practice for the two years prior to trial, and that he would continue to have no income from the dental practice into the future." (JA at 1106 n.7.) Mrs. Pevner testified that her husband earned approximately $40,000 per year from his dental practice (JA at 292), but that "the dental practice really went down the tubes" after the City's prosecution, and that Dr. Pevner soon "showed no interest, no concern" and "didn't want to see new patients." (JA at 259.) Dr. Zibelman also stated under oath that Dr. Pevner "was no longer able to practice dentistry as he once had," and that he could not "practice what he was trained to do in terms of his profession." (JA at 354, 360.)

Moreover, merely because Dr. Pevner could perform some work on a limited basis does not mean that he should be denied compensation for lost wages. Both the jury and the judge below found that the evidence at trial demonstrated damages for lost income in the amount of $274,000, and it is not our duty to second-guess those findings by drawing our own conclusions as to the value of Dr. Pevner's business and the losses which he incurred. The record contains credible evidence supporting Dr. Pevner's claims, and thus we find that the lower court acted within its discretion in upholding that portion of the jury's verdict regarding lost income.

3. *Additional Compensatory Damages*

We also reject the City's contention that Dr. Pevner is entitled to no more than the $363,130 in the out-of-pocket damages which he claimed at trial. Although Dr. Pevner's actual losses amounted to $363,130, the final verdict, following Judge Rodriguez's remittitur, totaling $863,130.

The City argues that the extra $500,000 awarded to Dr. Pevner is unsustainable, because (1) these damages are intangible and were not directly supported by evidence at trial, and because (2) these damages represent an improper effort to impose punitive damages on the City. We find that both of these arguments lack merit.

In choosing to remit the jury's verdict to $863,130, the trial judge made clear that the award in this case represented "$363,130 for special damages and $500,000 for pain and suffering, emotional distress, humiliation, and harm to plaintiff's reputation." (JA at 1121.) Contrary to what the City contends, these intangible damages for pain and suffering, emotional distress, and reputational injury are clearly permitted. As the Supreme Court has written, the level of damages in § 1983 disputes is generally determined by principles derived from the common law of torts. *Carey*, 435 U.S. at 257-58. "To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.' " *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 265 (3d Cir. 1995) (relief is available for "intangible injuries" in § 1983 cases). Therefore, although Dr. Pevner suffered only $363,100 in out-of-pocket losses, the district court did not abuse its discretion by awarding him an additional sum for emotional distress, humiliation, and other abstract harms. As long as there was sufficient evidence of intangible damages – and there was

(*see, e.g.*, JA at 1117) – Dr. Pevner was entitled to receive further compensation beyond his actual losses.[5]

Furthermore, nothing in the record supports the city's contention that the extra $500,000 in damages represented an improper attempt by the jury to impose punitive damages. As a general rule, § 1983 plaintiffs are not entitled to punitive damages against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Here, the City argues that because the final award so greatly exceeded Dr. Pevner's out-of-pocket losses, "there is no other logical explanation for the jury's excessiveness than that it improperly sought to punish the City with the imposition of *de facto* punitive damages." (City Br. at 31.)

It is true that "the size of a jury's verdict may be so excessive as to be inherently indicative of passion or prejudice," *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) (quotation omitted), and in the present case, we agree that the jury awarded Dr. Pevner a considerable amount of damages to compensate him for intangible harms. Moreover, even though the trial judge granted the City's motion for a remittitur, the final verdict still provided Dr. Pevner with $500,000 in supplementary damages. Nevertheless, the mere size of this compensatory award does not lead us to conclude

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[5] The City's contention that Dr. Pevner's intangible damages were caused by this litigation, and not by the 1989-1991 prosecution, is unavailing. There is no evidence in the record from which a jury could conclude that Dr. Pevner's emotional distress was caused by the initiation of this lawsuit; rather, as noted above, the evidence amply supports the district court's finding that the City's prosecution was the sole cause of Dr. Pevner's harms. (JA at 379.) *See supra* page 9.

that the jury was necessarily making an improper attempt to impose punitive damages on the City. To the contrary, we believe that the record shows that the jury and the district court acted within the bounds of their discretion by finding that Dr. Pevner was entitled to a substantial award beyond the damages awarded for his actual losses.

The district court's "careful review of the evidence presented at trial," (JA at 1121), revealed that a reasonable jury could have provided Dr. Pevner with $500,000 in intangible relief. Dr. Pevner presented nine witnesses, none of which were rebutted, to show that he had sustained extensive pain and suffering since 1989. Those nine witnesses established, *inter alia*, that the City's prosecution caused Dr. Pevner severe emotional distress, (JA at 277-79), ruined his dental career and professional life, (JA at 259), and created the need for long-term psychological care and medical expenses.[6] (JA at 364-67.)

Therefore, we cannot say that the trial court erred by refusing to grant a new trial or by granting a remittitur to $863,130. It is not our task to determine whether the jury

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[6] Furthermore, the City's reliance on *Sanders v. City of Indianapolis*, 837 F.Supp. 959 (S.D. Ind. 1992), to show that this damage award is presumptively punitive is misplaced. *Sanders* was a limited holding, establishing only that under the particular facts of that case, the plaintiff's injuries did not warrant compensatory damages of more than $78,000. *Id.* at 968. The *Sanders* plaintiff presented no evidence of medical expenses, psychological treatment, or injury to reputation. *Id.* at 965-66. In contrast, Dr. Pevner presented unrefuted evidence of all three of these harms. Thus, the facts in the record here show that trial court did not abuse its discretion by permitting Dr. Pevner to collect considerable compensatory damages.

awarded the precise amount of damages that we believe were warranted; we must merely ask whether the trial judge abused his discretion in finding that the relief was not "so grossly excessive as to shock the judicial conscience." *Williams*, 817 F.2d at 1039. In light of the unrefuted testimony of the witnesses who testified on Dr. Pevner's behalf, we are confident that he did not.

B. The Motion for Prejudgment Interest

The City's final contention is that the district court erred in granting Dr. Pevner's motion for prejudgment interest. "[T]he availability of interest in an action arising under a federal statute is governed by federal law." *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987), *abrogated on other grounds by Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 484 U.S. 827 (1990). Here, though, that federal law – § 1983 – provides no guidance as to whether prejudgment interest should be awarded. Thus, "[i]n the absence of an explicit congressional directive, the awarding of prejudgment interest under federal law is committed to the trial court's discretion." *Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972, 981-82 (3d Cir. 1984); *see also Saverese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989) (noting that prejudgment interest is committed to the discretion of the district court in federal question litigation).

In the case at bar, the district court exercised that discretion to award Dr. Pevner $131,404.83 in prejudgment interest pursuant to 28 U.S.C. § 1961. The City now argues that the trial judge committed reversible error by (1) failing to recognize that the jury must have included

prejudgment interest in its verdict, and by (2) finding that the equities favored awarding Dr. Pevner prejudgment interest.[7] Once again, we disagree.

The City begins by arguing that the size of the jury's general verdict "mandates the conclusion" that the jury considered prejudgment interest and factored it into its damage award. (City Br. at 41.) Therefore, it contends, the trial judge should not have given Dr. Pevner prejudgment interest because the jury had already done so.

It is true that we must caution against overcompensating litigants, because prejudgment interest is an equitable remedy, intended only to [sic] "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum*, 494 U.S. at 835-36 (1990) (quoting *Poleto*, 826 F.2d at 1280); *see also Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613 (2d Cir. 1994) (noting that the "courts must be careful that an award does not overcompensate a plaintiff"). However, it is also true that we are hesitant to reverse an award of prejudgment interest

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[7] The City's third contention, that the district court improperly awarded Dr. Pevner prejudgment interest for his state tort claims, is meritless. The district court specifically noted that it was awarding prejudgment interest under *federal* law (§ 1983), not state law, and it refused to "determine whether prejudgment interest is available under New Jersey law," because Dr. Pevner had elected to receive interest under federal law alone. *See* JA at 1126 n.1. Accordingly, there is not even an issue as to whether Dr. Pevner was entitled to prejudgment interest for the City's violations of state law.

absent specific evidence of an abuse of discretion. *Anthuis*, 971 F.2d at 1002.

Here, we have found no specific evidence that would support the City's assertion of overcompensation and we are thus given no rationale for upsetting the decision below. The record does not demonstrate that the jury considered prejudgment interest in its verdict, but, instead, indicates that the district court instructed the jury on the particular elements of compensatory damages, without mentioning delay damages or prejudgment interest at all. (JA at 792-99.) In addition, the City points to no evidence and provides no reason, beyond mere speculation, to show how size of the verdict was a product of the jury's effort to compensate Dr. Pevner for his delay in obtaining relief. Therefore, where the trial judge saw fit to award prejudgment interest to fully compensate the plaintiff, we will not disturb that ruling by reading facts into the record that do not exist.

We are equally unpersuaded by the City's contention that prejudgment interest was not warranted by the balance of the equities in this case. A district court is to consider four factors in deciding whether an award of prejudgment interest would be equitable, including: (1) whether the claimant has been less than diligent in prosecuting the action; (2) whether the defendant has been unjustly enriched; (3) whether an award would be compensatory; and (4) whether countervailing equitable considerations militate against a surcharge. *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 540 (3d Cir. 1983). On appeal, the City takes issue with only one of these four factors, claiming that it was not unjustly enriched by

prosecuting Dr. Pevner, and that prejudgment interest was thus improperly awarded.

We agree that the district court erred in applying the test for unjust enrichment. The district court adopted *Feather's* definition of unjust enrichment, which reads: "To the extent defendant has had the free use of the income-producing ability of plaintiffs' money without having to pay for it, he has been unjustly enriched." *Id.* (quoting *Recent Developments – Prejudgment Interest as Damages: New Application of an Old Theory,* 15 Stan. L. Rev. 107, 109 (1962)); (JA at 1127). The court then concluded that "the City has been unjustly enriched to the extent that it has had use of the money that rightfully belonged to the plaintiff as compensation for the deprivation of his constitutional rights." (JA at 1127.) Yet this reasoning has no limits; *every* defendant which loses a lawsuit for money damages "has had use of the money" that it now owes to the plaintiff as compensation. Thus, under the district court's reasoning, *every* losing defendant would be considered unjustly enriched for purposes of determining the appropriateness of prejudgment interest. Obviously, *Feather* requires more than that. A defendant must profit in some way, or must gain financially in some manner, at the expense of the plaintiff to be considered unjustly enriched. The mere fact that the defendant now owes money to the plaintiff in damages is not enough.

With this in mind, it is evident that the City was not unjustly enriched. Atlantic City collected no fees or dues from Dr. Pevner; it had no employment relationship with Dr. Pevner which involved salary payments or benefits; and there is no indication that it benefitted financially from prosecuting Dr. Pevner or Mr. McGrath. In fact, had

the City acted lawfully and not enforced the statute, it would be in the exact same financial position as it finds itself now (excluding the costs of this litigation).

Nevertheless, the fact that the City was not unjustly enriched does not, without more, compel us to reverse the district court's Order granting the motion for prejudgment interest. *See Rolf v. Blyth Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980) (holding that "the fact that the defendants were not unjustly enriched does not, standing alone, make it inequitable to compel them to pay interest"). Unjust enrichment is one of only four factors in the *Feather* test, and the district court determined that the remaining three elements all weigh in favor of awarding prejudgment interest in this case. (JA at 1127-28.) It specifically found that plaintiff was diligent in prosecuting this action and that other equitable considerations, including the City's resistance to settlement negotiations, warranted additional damages to fully compensate the plaintiff. (JA at 1127-28.) In particular, it noted that although Dr. Pevner commenced this action on May 27, 1993, the City's first settlement offer was not made until the first day of trial in March 1996. (JA at 1128.) Thus, as the district court wrote, "[h]aving made the decision not to engage in pretrial settlement negotiations, the City of Atlantic City will not now be heard to complain that the plaintiff is not entitled to compensation for the lost use of the funds during that period." (JA at 1128.) We see no reason to disturb this reasoning, and we therefore hold that the lower court acted within its discretion in finding that, on balance, the equities militate in favor of an award of prejudgment interest.

IV.

The district court did not abuse its discretion in ruling on the motions for new trial, remittitur, and pre-judgment interest. Accordingly, the lower court's Order dated May 12, 1997, and its Letter Opinion dated May 30, 1997, will be AFFIRMED.

TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

/s/ Marjorie O. Rendell, J.
Marjorie O. Rendell, J.

Dated: FEB 9 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5405

MILTON PEVNER

v.

CITY OF ALTANTIC CITY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 93-cv-02295)

Present: Scirica, Roth, and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on January 29, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 6, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk

Clerk

Dated: February 9, 1998

Supreme Court, U.S.
FILED
JUN 30 1998
OFFICE OF THE CLERK

No. 97-1937

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

CITY OF ATLANTIC CITY,
Petitioner,

v.

MILTON PEVNER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARY GREEN
COUNSEL OF RECORD
ROBERT A. DAVITCH
SIDKOFF, PINCUS & GREEN
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
(215) 574-0600

ATTORNEYS FOR RESPONDENT

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED FOR REVIEW

Respondent disagrees with petitioner's statement of questions presented for review. The question presented for review is whether this Court should exercise its discretion to grant the petition, when petitioner has not shown an important or compelling reason for granting certiorari and the issues relate solely to awards of monetary damages and prejudgment interest, which were subject to review on appeal under an extremely limited, abuse of discretion standard.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to this proceeding.

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STATEMENT OF THE CASE

A. Overview

In 1988, Dr. Milton Pevner purchased an eight-bedroom house in Atlantic City, New Jersey, with the intention of renting it out for income (A 20-21; SA 2).[1] At the time Dr. Pevner purchased that property, the City of Atlantic City ("Atlantic City") had in effect a restrictive zoning ordinance ("Ordinance") that prohibited more than three unrelated persons from occupying a single home in certain residential districts (A 20-21; SA 2). Beginning in the spring of 1989 and continuing through June of 1991, Atlantic City filed dozens of separate criminal charges against Dr. Pevner alleging that he violated the Ordinance repeatedly (A 21; SA 2). Since each separate violation of the Ordinance carried with it a potential jail sentence of ninety days, Dr. Pevner, if convicted, faced the prospect of going to jail for more than ten years (A 21). Although Dr. Pevner pleaded not guilty to all of the charges and denied that he had ever permitted more than three unrelated persons to occupy the property, the ever-increasing number of criminal charges caused him to reasonably become terrified that he *could* be thrown in jail for a long time. Furthermore, the threat of a lengthy incarceration hung over his head for *more than 18 months* while he awaited his criminal trial (A 21; SA 2).

While the criminal charges were pending, Dr. Pevner became aware that publicity surrounding the charges was

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[1] References to the appendix attached to the petition for writ of certiorari shall be cited herein as "A ____", with the page numbers following the designation "A". References to the supplemental appendix which was filed by petitioner under separate cover shall be cited as "SA ___", with the page numbers following the designation "SA".

widespread in and around the Atlantic City area (A 21). Several days of hearings on the criminal charges were conducted before the Atlantic City municipal court between October 1990 and February 1991 (A 21; SA 2). Because Atlantic City regarded the case against Dr. Pevner as a "test case" for enforcement of the Ordinance, it hired a special prosecutor (A 21). Finally, on February 15, 1991, the municipal court found Dr. Pevner guilty on all charges, sentenced him to probation for one year and ordered him to pay a heavy fine (A 21-22; SA 2).

Dr. Pevner appealed his conviction to the Superior Court of New Jersey which, in an order dated June 7, 1991, reversed the conviction, determined that Dr. Pevner was not guilty of even one violation of the Ordinance and declared that the Ordinance was unconstitutional because it "placed unreasonable restrictions upon [Dr. Pevner's] right to use and rent [his property], contrary to the Constitutional requirements of substantive due process" guaranteed by the Fourteenth Amendment and the New Jersey Constitution (A 22; SA 2-3). The Superior Court of New Jersey found also that "there was insufficient, credible admissible evidence" to sustain the guilty verdict (SA 3). Atlantic City did not appeal from or request reconsideration of the Superior Court's ruling (A 22; SA 3).

B. History of the Proceedings

On May 27, 1993, Dr. Pevner commenced an action against Atlantic City under 42 U.S.C. § 1983 ("§1983") and the New Jersey Constitution, alleging that Atlantic City's two-year criminal prosecution of him under the invalid Ordinance violated the United States and New Jersey Constitutions and caused him to suffer severe emotional distress, mental anguish, embarrassment, humiliation, damage to his reputation as well as various economic losses (A 1-15,

22; SA 3). In an order dated December 29, 1994, the district court granted Dr. Pevner's motion for summary judgment on the issue of Atlantic City's liability under § 1983 and the New Jersey Constitution, determining as a matter of law that Atlantic City "violated 42 U.S.C. § 1983 and the New Jersey Constitution, and [Dr. Pevner's] rights to due process thereunder, by prosecuting [Dr. Pevner] under [the] Ordinance... and by otherwise enforcing the said Ordinance against [him]" (A 16-17, 22; SA 3).

After determining the liability issues in favor of Dr. Pevner, the district court scheduled a jury trial on Dr. Pevner's damages claims. That trial was conducted between March 18, 1996 and March 21, 1996 (A 22-23; SA 3). Nine witnesses, including Dr. Pevner's treating psychiatrist, testified for Dr. Pevner during the damages trial, and no rebuttal evidence was offered by Atlantic City (A 23, 45-46 n.9; SA 15). The jury thus received what the district court referred to as "a mountain of evidence" that allowed it to determine and assess the severe harm, damages and injuries which Dr. Pevner had suffered and would continue to suffer as a result of Atlantic City's proven violation of his rights (A 45-46 n. 9; SA 6-16). As the district court and court of appeals noted, Dr. Pevner's witnesses established compellingly, without any contradictory evidence offered by Atlantic City, that Atlantic City's violation of his rights caused him to suffer out-of-pocket economic losses that amounted to $363,130 in the aggregate,[2] as well as a

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[2] Atlantic City conceded in its post-trial motion, in its appeal to the Third Circuit and in its petition for writ of certiorari filed with this Court that, at trial, Dr. Pevner presented evidence of $363,130 in special, economic damages resulting from the constitutional violations and that the jury had a proper and valid basis for awarding all of these damages to Dr.

(continued...)

devastating psychiatric illness that drastically altered his personality and self-image and reduced his formerly active, robust and energetic lifestyle to a pale and lusterless shell of what it had been prior to 1989 (A 23-28, 37-49; SA 6-16). For example, Dr. Pevner's witnesses testified that Atlantic City's wrongful, relentless prosecution of him had forced him to all but give up his thriving neighborhood dental practice and had transformed him from an active, fun-loving husband, father and dentist, into an untrusting, depressed, lifeless, brooding man who would not leave his home and could no longer function as a self-sufficient adult (A 23-28, 37-49; SA 6-16). Furthermore, the unrebutted evidence offered by Dr. Pevner's treating psychiatrist and other witnesses established that Dr. Pevner's mental illness caused by the 1989-91 prosecution did not improve or suddenly disappear when he "won" his criminal case on appeal in 1991, but rather, that he continued to experience severe and unremitting anxiety, depression, mental anguish and emotional distress as a result of the prosecution right up to the time of trial in 1996 (A 41-44; SA 7-11).

Common law tort principles governed the proofs at the damages trial because, as this Court has noted, 42 U.S.C. § 1983 creates "a species of tort liability in favor of persons who are deprived of 'rights, privileges or immunities' secured to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978). *See also, Memphis Community School*

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[2](...continued)
Pevner (A 33; SA 6-7, 12-13; petition for certiorari at 4 & n. 1). Atlantic City has acknowledged that these economic damages consisted of attorney's fees which Dr. Pevner incurred in defending the criminal prosecution, lost rental income from the property, Dr. Pevner's past and future psychiatric bills and income that Dr. Pevner lost from his dental practice from 1989 through 1995 due to stress and anxiety resulting from the criminal prosecution. (Petition for certiorari at 4 & n.1).

District v. Stachura, 477 U.S. 299, 306 (1986). As this Court has declared, "[t]he basic purpose" of a § 1983 damages claim is "to compensate [the plaintiff] for injuries that were caused by the deprivation of constitutional rights," *Carey, supra,* at 254, and therefore, damages to redress a proven violation of § 1983 "may include not only out-of-pocket loss and other monetary harm, but also such injuries as 'impairment of reputation..., personal humiliation and mental anguish and suffering'", *Stachura, supra,* at 306-07, *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).[3]

On March 22, 1996, the jury returned a general verdict in favor of Dr. Pevner which awarded him $1,238,788.50 in *compensatory* damages as a remedy for Atlantic City's violations of § 1983 (A 18-19, 29; SA 3). In awarding this amount to Dr. Pevner, the jury answered the following question:

> What amount do you find will reasonably and *fairly compensate* plaintiff Milton Pevner for the damages he has sustained? (emphasis added) (A 18).

On April 4, 1996, Atlantic City filed a motion for a new trial on damages, or in the alternative, for remittitur of

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Atlantic City's contention that, at trial, Dr. Pevner only presented evidence of $363,130 in special damages, and did not offer any evidence of pain and suffering, emotional distress, mental anguish, etc. (petition for certiorari at 4), is thoroughly repudiated by the entire trial record. In actuality, and as the district court and court of appeals found, Dr. Pevner offered page after page of compelling, unrebutted testimony of these intangible, non-economic harms and his proofs were fully consistent with the teachings of this Court in *Carey* and *Stachura* (A 23-28, 37-49; SA 6-16).

the verdict (A 29; SA 3). Atlantic City's post-trial motion raised one issue only – that the verdict was excessive.

On May 13, 1997, the district court issued an opinion and order regarding Atlantic City's post-trial motion in which it found, after conducting a thorough and comprehensive review of the record, that: (a) as Atlantic City had conceded, the evidence supported an award to Dr. Pevner of $363,130 in special, economic damages; (b) in addition, Dr. Pevner had proven an entitlement to a substantial award of non-economic damages for pain and suffering, emotional distress, mental anguish, humiliation and impairment of reputation; (c) Atlantic City's arguments that Dr. Pevner's evidence of emotional distress was too speculative and that any emotional distress he suffered was not proximately caused by the constitutional violations were without merit; and (d) however, the jury's award to Dr. Pevner of approximately $875,000 for pain and suffering, emotional distress, mental anguish, humiliation and other non-economic damages was excessive (A 20-52; SA 3). After conducting a well-reasoned and painstaking analysis of the trial record and reviewing jury verdicts and other § 1983 cases, the district court concluded that the evidence supported an award to Dr. Pevner of $500,000 (rather than $875,000) for pain and suffering, emotional distress, mental anguish, humiliation and harm to reputation (A 45-52). Accordingly, the district court denied Atlantic City's motion for a new trial but granted its request for remittitur, giving Dr. Pevner the option of accepting a remittitur of the verdict from $1,238,788.50 to $863,130,[4] or

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[4] The figure $863,130 represented the $363,130 in undisputed special damages plus the additional sum of $500,000 which the district court determined was appropriate to compensate Dr. Pevner for his non-economic injuries (pain and suffering, emotional distress and the like) (A (continued...)

submitting to a new trial on damages (A 52). On May 21, 1997, Dr. Pevner accepted remittitur of the jury verdict to $863,130, and therefore waived a new trial on damages (A 53-55).

After judgment was entered on the verdict, Dr. Pevner filed a motion pursuant to Fed.R.Civ.P. 59(e) to amend the judgment to include prejudgment interest (A 58). In a letter opinion that was filed on June 6, 1997, the district court granted that motion and awarded Dr. Pevner prejudgment interest, pursuant to § 1983, in the amount of $131,404.83 (A 58-62). In support of its ruling, the district court reviewed the controlling authority which provides that in § 1983 cases, district courts have the equitable discretion to award prejudgment interest to prevailing plaintiffs (A 59-60). The court then determined that, under the facts of this case, an award of prejudgment interest to Dr. Pevner was appropriate to effectuate the salutary purposes of § 1983 as well as to promote the policy of encouraging defendants to settle at the early stages of litigation (A 59-62). On the latter point, the district court noted that Atlantic City did not make its first settlement offer until the day of trial, and therefore, could not be heard to complain that Dr. Pevner was not entitled to be compensated for the lost use of the money he was awarded by the jury (A 62).[5]

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[4](...continued)
52).

[5] The district court calculated prejudgment interest pursuant to 28 U.S.C. § 1961 at the rate of 5.14%, with annual compounding from the time the action was commenced until the date judgment was entered. Atlantic City did not take issue with the method of calculation or the rate used. Rather, it argued that Dr. Pevner was not entitled to prejudgment (continued...)

On June 6, 1997, the district court granted an amended judgment in favor of Dr. Pevner and against Atlantic City in the amount of $994,534.83 (A 56-57). The amended judgment included the remitted verdict of $863,130, plus prejudgment interest in the amount of $131,404.83 (A 56-57).

Atlantic City appealed the district court's order granting the amended judgment to the Third Circuit. On appeal, Atlantic City challenged the district court's denial of its motion for a new trial, its decision to remit the verdict to $863,130 (rather than to a lesser amount) and its order awarding prejudgment interest (SA 1-2, 4). Atlantic City did *not* challenge in its appeal to the Third Circuit the district court's liability determination in favor of Dr. Pevner; rather, the appeal focused solely upon the district court's rulings regarding the damages issues (SA 1-21).

In a reasoned and scholarly opinion filed on February 9, 1998, the Third Circuit affirmed the judgment of the district court, determining that the district court did not abuse its discretion in denying Atlantic City's motion for a new trial, in remitting the verdict to $863,130 or in awarding prejudgment interest to Dr. Pevner on his § 1983 claim (SA 1-21). The Third Circuit emphasized the limited nature of the scope of its review and the broad discretion that is accorded to district courts in deciding post-trial motions relating to damages awards (SA 4-6). *See, Gumbs v. Pueblo Int'l., Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (emphasizing Third Circuit's "severely limited" role in reviewing trial courts' decisions on motions for new trial or remittitur); *Semper v. Santos,* 845 F.2d 1233, 1236 (3d Cir. 1988) (stressing that

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[5](...continued)
interest as a matter of law.

district court's ruling on adequacy of damages should not be disturbed on appeal unless "manifest abuse of discretion" can be shown); *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1039 (3d Cir. 1987) ("[T]he scope of [Third Circuit's] review of a damage award is exceedingly narrow"). Relying upon its prior decisions and the decisions of other courts of appeal, the Third Circuit stated that where, as in this case, the damages awarded by a jury have already been subjected to thorough scrutiny by the trial court and the trial court has granted a remittitur, the court of appeals should give "additional deference" to the trial court's ruling. *See, Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 206 (3d Cir. 1996); *DeLeon Lopez v. Corporacion Insular De Seguros*, 931 F.2d 116,126 (1st Cir. 1991) (SA 5). In addition, citing to its earlier decisions, the Third Circuit noted that it was hesitant to reverse a factual determination by the trial judge regarding pain and suffering and emotional distress damages because evidence of those types of damages is "particularly ill-suited to review upon only a written record". *Edynak v. Atlantic Shipping Inc. CIE, Chambon Maclovia S.A.*, 562 F.2d 215, 227 n. 16 (3d Cir. 1977) (SA 5).[6]

After discussing the narrow scope of its review and the broad discretion it was obliged to accord to the district court, the Third Circuit rejected each of the arguments Atlantic City made in its appeal (SA 6-21). Specifically, the Third Circuit rejected Atlantic City's arguments that Dr. Pevner's evidence of emotional distress was too speculative; that Dr. Pevner failed to prove that his emotional distress was proximately caused by Atlantic City's violations of 42 U.S.C.

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[6] The Third Circuit stated also that the scope of its review of the district court's award of prejudgment interest was likewise limited to abuse of discretion. *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992) (SA 5).

§ 1983; that Dr. Pevner was entitled to recover no more than the $363,130 in economic damages which he proved at trial;[7] and that the additional sum of $500,000 that Dr. Pevner was awarded for non-economic injuries was not supported by the evidence (SA 6-16). In concluding that the district court did not abuse its discretion in any of its rulings, the Third Circuit performed its own comprehensive review of the plethora of unrebutted evidence that Dr. Pevner presented at trial (SA 6-16).

The Third Circuit also affirmed the district court's award of prejudgment interest to Dr. Pevner, finding that there was no abuse of discretion and that the facts of the case supported such an award (SA 16-21). In upholding the award of prejudgment interest, the Third Circuit dismissed Atlantic City's contention that prejudgment interest was not available to Dr. Pevner under New Jersey law (on his companion state claim arising under the New Jersey Constitution), noting that the district court had expressly awarded prejudgment interest under *federal* law (§1983) and had properly refused to determine whether prejudgment interest was available under New Jersey law because Dr. Pevner had elected to receive the interest under *federal* law alone (A 59; SA 17). *See, Hatco Corp. v. W.R. Grace & Co.,* 849 F.Supp. 931, 980 (D.N.J. 1994) (where plaintiff in federal action prevails on federal and state claims which arise from same facts, plaintiff may elect to receive prejudgment interest under either federal or state law).

On February 9, 1998, the Third Circuit entered a

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7 The Third Circuit correctly noted that both parties acknowledged that the jury awarded Dr. Pevner damages, based upon evidence presented at trial, of $363,130 in out-of-pocket, economic losses (SA 7 & n. 2; 12).

judgment affirming the judgment of the district court which awarded Dr. Pevner $994,534.83 (A 56-57; SA 22). Atlantic City's petition for certiorari followed.

REASONS FOR DENYING THE WRIT

A. Atlantic City's petition does not present any compelling reason for granting a writ of certiorari

Supreme Court Rule 10 provides, in relevant part, that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons". Rule 10 goes on to state that such "compelling reasons" may be found to exist where a United States Court of Appeals has rendered a decision that conflicts with a decision of another United States Court of Appeals on the same important matter, a United States Court of Appeals has decided an important federal question in a way that conflicts with a decision by the highest court of a state or where a United States Court of Appeals has decided an important question of federal law in a way that conflicts with decisions of this Court. Furthermore, Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Atlantic City's petition does not even arguably implicate any of the "compelling reasons" for granting certiorari which are listed in Supreme Court Rule 10. Rather, the gist of Atlantic City's petition is that the *factual findings* made by the district court and the Third Circuit regarding Dr. Pevner's damages claims are erroneous, and that the district court and Third Circuit abused their discretion in deciding Atlantic City's motion for new trial and Dr.

Pevner's motion for prejudgment interest. Dr. Pevner strongly disputes that either of the courts below made any erroneous factual findings or committed an abuse of direction. For the purposes of this brief, however, it suffices to say that Atlantic City's petition should be denied for no other reason than it fails to come close to demonstrating that there is a "compelling reason" for granting certiorari, as defined by Supreme Court Rule 10.

To further prove the point, this Court has established a general rule that it will *not* review an order issued by a district court or court of appeals denying a motion for new trial which alleged that a jury verdict was excessive. As this Court stated in *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474, 481 (1933):

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

Accord, *Southern Railway Co. v. Bennett*, 233 U.S. 80, 87 (1914); *Lincoln v. Powers*, 151 U.S. 436 (1894); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910). Since Atlantic City's petition challenges *factual* determinations relative to a damages award, this line of authority precludes the granting of certiorari.

To be sure, this Court's policy of refusing to review cases such as this is based upon sound logic, since a district

court's action in denying a new trial on damages or in granting a remittitur is subject to review by a court of appeals under a narrow abuse of discretion standard. *Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 279 (1989). In decisions which have not been challenged by Atlantic City, the Third Circuit has ruled that the scope of its review of a damages award is "exceedingly narrow", *Williams,* 817 F.2d at 1038, and that when a remittitur has already been granted by the district court, the scope of its review is "severely limited," *Delli Santi*, 88 F.3d at 206. The First Circuit in *DeLeon Lopez, supra*, echoed this well-settled principle of law when it stated, at 931 F.2d 125:

> [W]hen the trial judge performs verdict surgery [by granting a remittitur]..., an appellate court must be slow to interfere with the operation's outcome. The reason is apparent... '[I]t is surpassingly difficult on the basis of an algid appellate record to quantify money damages for intangible losses.' (citation omitted). Where, as here, the plaintiff's injuries fall within this rubric, and there exists no truly objective way to measure damages, the trial judge's view is entitled to considerable deference. (citation omitted). In other words, the scope of appellate review of post-remittitur damages for non-economic losses is extremely narrow and the ambit of the trial court's discretion is correspondingly broad.

This rationale is particularly applicable to the instant case since the district court remitted the portion of the verdict which was intended to compensate Dr. Pevner for his non-economic injuries by approximately $375,000. The Third Circuit having refused to remit the verdict again, further

review by this Court is clearly inappropriate.

It is also well established that an appellate court should be extremely reluctant to disturb the decision of a trial court denying a new trial or setting the amount for remittitur because "[t]he trial judge is in the best position to evaluate the evidence and assess whether the jury's verdict is rationally based." *Gumbs, supra*, 823 F.2d at 772. *Accord, Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983) (considerable deference should be given to trial judge, "who was present to hear all the evidence and to observe the demeanor of all the witnesses"); *Anthony v. G.M.D. Airline Services*, 17 F.3d 490, 496 (1st Cir. 1994) ("Having presided over the trial and observed...the...witnesses firsthand, the district court judge is in the best position to assess the evidence and set an amount for remittitur"); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995) ("Because the trial judge is uniquely situated to rule on [a motion for new trial, he] has great discretion in determining whether to grant a new trial"). Furthermore, the courts of appeal have established the general principle that damages for pain and suffering and emotional distress are not rationally a subject for a second remittitur on appeal. *DeLeon Lopez, supra*, 931 F.2d at 126 (where damages awarded by jury have been subjected to thorough scrutiny by trial judge who remitted verdict, "the court of appeals has no warrant to insist upon a retrial or to reduce the award still further"). *See also, Gatreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 783 (5th Cir. 1996) (because "[a]wards of pain and suffering are fact-specific and depend to a great extent on the fact-finder's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation...the district court is accorded great latitude in assessing damages"); *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995) (appellate court's normal disinclination to second guess jury evaluation of proper amount of damages "is magnified where...the damages entail a monetary evaluation

of intangible losses"). This long line of well-settled authority simply underscores the fact that Atlantic City has not presented a "compelling reason" for granting a writ of certiorari.

B. There is nothing in the record to suggest that any of the damages awarded to Dr. Pevner were punitive

Atlantic City's argument that the damages award reflects that the jury intended to punish Atlantic City is pure speculation. Indeed, Atlantic City has pointed to nothing in the record, other than the verdict itself, which suggests that the jury wanted to punish Atlantic City. On the other hand, Dr. Pevner did not ask for punitive damages and the district court did not charge the jury on punitive damages. However, in accordance with the teachings of this Court in *Carey* and *Stachura*, the district court did instruct the jury that the sole purpose of a damages award in a § 1983 case is to fairly *compensate* the plaintiff for injuries proximately caused by the deprivation of his constitutional rights (A 18). Atlantic City's "punishment" argument is further belied by its own admission that the jury had a valid basis for awarding Dr. Pevner $363,130 in special *compensatory* damages and the fact that, as the district court and Third Circuit found, the evidence fully supported the remitted award of $500,000 for non-economic *compensatory* damages (A 23-28, 33, 37-52; SA 6-16; petition for certiorari at 4, 7).

In rejecting Atlantic City's contention that the jury intended to assess punitive damages against Atlantic City, the Third Circuit, after reviewing the record, properly concluded that "the jury and the district court acted within the bounds of their discretion by finding that Dr. Pevner was entitled to a substantial award beyond the damages awarded for his actual

[economic] losses" (SA 15). In dismissing Atlantic City's argument that even the remitted non-economic damages award of $500,000 was punitive, the Third Circuit opined:

> The district court's 'careful review of the evidence presented at trial'...revealed that a reasonable jury could have provided Dr. Pevner with $500,000 in intangible relief. Dr. Pevner presented nine witnesses, none of which were rebutted, to show that he had sustained extensive pain and suffering since 1989. Those nine witnesses established, *inter alia*, that the City's prosecution caused Dr. Pevner severe emotional distress,...ruined his dental career and professional life,...and created the need for long-term psychological care... (SA 15).

There is simply no basis whatsoever for questioning or reviewing the Third Circuit's conclusions, which find ample support in the record.

Atlantic City's reliance upon this Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), is misplaced. In *City of Newport*, the plaintiffs brought suit against a city under § 1983 and sought to recover compensatory *and* punitive damages. Without any objection, the trial court gave an instruction authorizing the jury to award punitive damages against the city. The jury found in favor of the plaintiffs and returned a verdict against the city which included punitive damages. The city moved for a new trial, arguing that punitive damages could not be awarded against a municipality under § 1983. On appeal, this Court ruled, as a matter of law, that municipalities are immune from liability for punitive damages under § 1983. 453 U.S. at 271. However, this Court in *City of Newport* was careful to point

out that *compensatory* damages can be awarded against municipalities to remedy violations of § 1983. 453 U.S. at 270. And of course, in *Carey* and *Stachura, supra,* this Court expressly ruled that a plaintiff who prevails in a § 1983 case is entitled to recover *compensatory* damages for mental anguish, emotional distress, humiliation and impairment to reputation.

Dr. Pevner's case has virtually nothing in common with *City of Newport* for the simple reason that he did not *sue* for punitive damages, the jury in his case was not *charged* on punitive damages and the jury in his case did not *award* any punitive damages. Rather, his entire damages award was comprised of *compensatory* damages. On the other hand, it was precisely *because* the jury in *City of Newport* was charged on and awarded punitive damages that this Court granted certiorari. In light of these obvious distinctions, Atlantic City's argument that the Third Circuit's decision in this case is inconsistent with this Court's holding in *City of Newport* is, to put it charitably, specious. In actuality, the two cases are not even remotely analogous. Whereas the jury and the district court in this case had every right and reason to award Dr. Pevner $500,000 in intangible *compensatory* damages, the jury in *City of Newport* was precluded as a matter of law from awarding *punitive* damages against the defendant city.[8]

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[8] As the Third Circuit determined, Atlantic City's reliance upon *Sanders v. City of Indianapolis*, 837 F.Supp. 959 (S.D. Ind. 1992), to show that the damages awarded to Dr. Pevner were presumptively punitive, is also misplaced (SA 15). The holding in *Sanders* was limited to the facts of that particular case, where the plaintiff presented no evidence of medical expenses, psychological treatment or harm to his reputation. *Id.* 965-66. Conversely, as the Third Circuit duly noted, Dr. Pevner presented compelling unrefuted evidence of all three of these types

(continued...)

C. Atlantic City's argument that Dr. Pevner presented evidence of no more than $363,130 in damages is thoroughly repudiated by the record

In its petition, Atlantic City urges that "Dr. Pevner's own proofs sought damages of no more than $363,130," and that he only *attempted* to prove he was entitled to recover that amount. Therefore, Atlantic City contends, Dr. Pevner's damages should have been "capped" at $363,130, which both parties acknowledged represented the full amount of his special, economic damages. Accordingly, the argument goes, the additional award of $500,000 to Dr. Pevner for pain and suffering, emotional distress, etc. is not supported by any evidence.

This argument is premised on a gross misapprehension of the record. As the district court and the Third Circuit properly found, the trial record contained page after page of compelling, uncontradicted proof from nine witnesses which gave the jury every right to conclude that Atlantic City's wrongful acts caused Dr. Pevner to suffer severe and unremitting psychiatric illness, mental anguish, emotional distress, anxiety, stress, humiliation and impairment of reputation, *in addition to* the $363,130 in economic losses (A 23-28, 37-49; SA 6-16). This unrefuted evidence led the district court to conclude, rightfully, that reimbursing Dr. Pevner for his economic losses did *not* fully compensate him for the injuries caused by Atlantic City's violations of his rights (A 33-35). The same evidence caused the Third Circuit to determine that "although Dr. Pevner suffered only $363,100 in out-of-pocket losses, the district court did not abuse its discretion by awarding him an additional sum [of

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[8](...continued)
of harm (SA 15).

$500,000] for emotional distress, humiliation, and other abstract harms" (SA 13). Furthermore, Dr. Pevner had *every right* to recover these additional, non-economic damages under the teachings of this Court in *Carey* and *Stachura*, *supra*.

Atlantic City's argument that Dr. Pevner did not *seek* to recover damages for non-monetary harm is further belied by the fact that Dr. Pevner specifically sought damages for "mental anguish, emotional distress, embarrassment and humiliation, fright, fear, personal indignity and anxiety" as well as harm to his reputation in his complaint (A 13-14), and in his opening and closing speeches to the jury, these damages were described and sought with force. In addition, the district court gave the jury comprehensive instructions on all of these non-economic damages, with no objection from Atlantic City. These instructions, which were submitted in writing by Dr. Pevner, were entirely consistent with the evidence presented at trial as well as the holdings of this Court in *Carey* and *Stachura, supra*.

In their respective opinions, the district court and the Third Circuit reviewed the compelling, unrebutted evidence of pain and suffering, emotional distress, mental anguish, humiliation and harm to reputation which Dr. Pevner sustained as a result of Atlantic City's violations of § 1983 (A 23-28, 38-49; SA 6-16). These factual findings merely underscore the lack of merit in Atlantic City's argument that Dr. Pevner failed to prove that he sustained any non-economic harm. In particular, the district court's findings that Dr. Pevner "experienced severe emotional distress throughout the period in which he received the summonses and continuing through the municipal court prosecution and appeal, and...that the City's wrongful conduct was the proximate cause of the distress" (A 41), is amply supported by the unrefuted testimony of Dr. Pevner's witnesses. In

addition, there was an abundance of evidence which supported the district court's and Third Circuit's findings that Dr. Pevner's mental distress and emotional illness caused by the 1989-91 prosecution did not improve when the prosecution ended in 1991, but rather, continued until the time of trial in 1996 (A 23, 26-27, 33,34, 38-39,42-43, 48; SA 8-10, 15). For example, there was uncontradicted evidence which showed that whereas Dr. Pevner had always been a fun-loving, optimistic and socially active person prior to the prosecution, from 1989 until 1996 his mood had changed to one of chronic depression and pessimism, as a result of which he all but abandoned his dental practice and spent most of his time sitting at home, sleeping and fretting about being prosecuted again (A 23, 27, 38-39, 42-43). Two of Dr. Pevner's long-time friends and one of his patients gave unrebutted testimony that enabled the jury to determine that, as a result of the prosecution and during the years 1989 through 1996, he had become angry, hostile, argumentative, depressed and confused – a far cry from the outgoing, fun-loving, jovial man they had known in the years prior to 1989 (A 26-27, 33-34, 38, 42-43, 48). Moreover, Dr. Pevner presented the testimony of his treating psychiatrist who stated, without contradiction, that the cause of all of Dr. Pevner's stress and anxiety from 1989 to 1996 was the criminal prosecution (A 25-26, 39-40, 43, 48). Thus, the Third Circuit was easily able to conclude that Dr. Pevner's witnesses established "that he had sustained extensive pain and suffering since 1989" and "that the City's prosecution caused Dr. Pevner severe emotional distress...[and] ruined his dental career and professional life" (SA 15).

D. There was ample evidence which established that Dr. Pevner's emotional distress from 1989 to the time of trial was proximately caused by Atlantic City's violations of 42 U.S.C. § 1983

In its petition, Atlantic City has rehashed the same argument it made, unsuccessfully, to the district court and Third Circuit: that Dr. Pevner failed to prove that any of the emotional distress he claimed to have suffered after June of 1991 (when his criminal conviction was overturned) was proximately caused by Atlantic City's prosecution of him during the years 1989 through 1991. Atlantic City urges that since the prosecution ended in 1991 (with a ruling in his favor) and he did consult a psychiatrist until 1994, anything that happened to Dr. Pevner after June of 1991 – including his reaction to threatening correspondence he received from Atlantic City in 1994 – could not have proximately resulted from the prosecution.[9]

The simple response to this argument is that all of the evidence showed the opposite, and gave the jury a reasonable basis for finding that Dr. Pevner endured severe emotional distress from 1989 until the time of trial on 1996 as a result of the 1989-91 prosecution. As the district court noted, Dr. Pevner offered a wealth of unrebutted testimony from at least five witnesses which established that he continued to be plagued by severe anxiety, depression, mental illness and emotional distress – as a result of the prosecution – on an ongoing basis from 1989 until 1994, and that his response to Atlantic City's 1994 correspondence resulted in a temporary (albeit severe) aggravation of his pre-existing, severe emotional problems that were caused by the wrongful prosecution in the years 1989-91 (A 41-44, 47-48). For example, Dr. Pevner's treating psychiatrist expressed the

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[9] The evidence showed that Dr. Pevner suffered a severe emotional reaction to letters he received from Atlantic City in 1994 which gave him reason to believe that he would be prosecuted again by Atlantic City under the same Ordinance that had been invalidated three years earlier (A 24, 48-49).

opinion that Dr. Pevner's severe psychological problems had their onset with the prosecution in 1989 and continued unabated until 1994; he explained to the jury the medical reasons why Dr. Pevner did not return to his "old self" after he "won" his criminal case in 1991 (A 43). Other witnesses testified that after 1991, Dr. Pevner lived in constant fear that he was going to be prosecuted again and that his anxiety, depression, confusion and other mood changes did not subside after June of 1991, but rather, continued to plague him on a chronic basis until he received Atlantic City's correspondence in 1994 (A 42-43, 48). Based upon this evidence, the district court concluded that the jury could have reasonably found that the 1994 correspondence merely "exacerbated the pre-existing emotional problems that were precipitated by Atlantic City's prior wrongful conduct" and that Dr. Pevner's reaction to that correspondence was merely "a manifestation of the underlying condition from which [he] suffered as a result of the City's actions" (A 41-44). Accordingly, Atlantic City's attempt to isolate the events surrounding Dr. Pevner's reaction to the 1994 correspondence, and to treat that reaction as a "new injury," is devoid of evidentiary support; the jury had a proper basis to find that *all* of Dr. Pevner's emotional distress from 1989 through 1996 was proximately caused, and set in motion by the 1989-91 prosecution.[10]

In affirming the district court, the Third Circuit likewise rejected Atlantic City's argument that the evidence

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[10] The district court found also, based upon the unrebutted evidence, that the fact that Dr. Pevner waited until 1994 to seek professional help did not militate against the finding that his emotional distress continued uninterrupted from 1989 until 1994 (A 44). The district court summarized the evidence that showed Dr. Pevner was in need of psychiatric help from 1989 through 1994, but that he resisted going to a therapist in those years because he believed he would "get out of it himself" (A 44).

did not support the finding that any anxiety or distress which Dr. Pevner suffered after June of 1991 was proximately caused by Atlantic City's wrongful conduct (SA 9-11). The Third Circuit duly noted that the record contained extensive evidence, including the testimony of Dr. Pevner's wife, two of his long-time friends and his treating psychiatrist, which showed that Dr. Pevner "continued to experience severe anxiety, depression, mental anguish and emotional distress *as a result of the prosecution* from 1989 through 1994" (SA 10). For example, the treating psychiatrist testified that "there were no other stressors that...would cause these symptoms" other than Atlantic City's prosecution of Dr. Pevner (SA 10). This evidence, taken in its entirety, caused the Third Circuit to conclude, rightfully, that:

> [A] reasonable jury could have found that Dr. Pevner's emotional reaction in 1994 [to Atlantic City's correspondence] was not the result of any unrelated incident, or a distinct and separate cause in and of itself, but was, rather, the manifestation of a chronic, underlying emotional disorder which had continued unabated since the City first charged Dr. Pevner with a violation of the zoning ordinance in 1989 (SA 10-11).[11]

In summary, based upon the record that Dr. Pevner made at trial, it was well within the jury's province to resolve the proximate cause issue in his favor. The jury had every

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[11] Furthermore, the unrebutted evidence showed that Dr. Pevner continued to suffer severe mental anguish and emotional distress as a result of the prosecution from the time he received Atlantic City's correspondence in 1994 until the time of trial in 1996 (A 27, 38, 42-43).

right to find that Dr. Pevner was an "eggshell plaintiff" who was severely harmed by Atlantic City's wrongful conduct in the years 1989-91, as a result of which he was predisposed and more vulnerable to suffering *further* harm when he reasonably believed, upon reading the 1994 correspondence, that Atlantic City was going to prosecute him again under the same unconstitutional Ordinance. Since the district court charged the jury on the issue of proximate cause in accordance with the evidence and *Federal Jury Practice and Instructions* §§ 80.18, 80.19 and 103.14, with no objection from Atlantic City, Atlantic City cannot be heard to complain to this Court -- especially after the courts below rejected the same argument - that there was insufficient evidence of proximate cause.

E. The district court and Third Circuit properly determined that Dr. Pevner was entitled to an award of prejudgment interest

On June 6, 1997, the district court granted Dr. Pevner's motion to amend the judgment to include prejudgment interest (A 58-62). The district court awarded prejudgment interest because Dr. Pevner prevailed on his claim arising under § 1983 (A 59-60). It reviewed the controlling authority which supports the proposition that, in § 1983 cases, courts may award prejudgment interest in accord with equitable principles, and observed that "[c]ourts typically find that prejudgment interest should be awarded to a prevailing plaintiff in a Section 1983 action to effectuate the salutary purposes of the statute" (A 59-60). *See, Savarese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989) (§ 1983 case)(where federal statute is silent on subject of prejudgment interest, trial court may, in its discretion, award prejudgment interest to prevailing plaintiff). The district court exercised its discretion in favor of awarding prejudgment interest to Dr.

Pevner under § 1983, noting that the equities of the case supported such an award (A 60-62).[12]

The Third Circuit affirmed the district court's award of prejudgment interest to Dr. Pevner, reasoning that the district court did not abuse its discretion and that the balance of the equities, including Atlantic City's resistance to settlement negotiations, warranted the award (SA 16-20). The Third Circuit relied in part on *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990), where this Court declared that prejudgment interest is an equitable remedy designed "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant" (SA 17).

In its petition, Atlantic City does not take issue with the principle that the court in a § 1983 case has the equitable discretion to award prejudgment interest. Rather, Atlantic City urges that since the jury's verdict was a *general* verdict which awarded Dr. Pevner damages for Atlantic City's violations of both § 1983 and the New Jersey Constitution, and New Jersey law precludes awards of prejudgment interest against municipalities on claims arising under New Jersey *state* law, Dr. Pevner was not entitled to prejudgment interest. The district court and Third Circuit rejected this argument, and their decisions should neither be disturbed nor

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12 Applying similar logic, this Court in other types of federal question cases has affirmed awards of prejudgment interest in order to fully compensate injured parties. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 17 (1933); (prejudgment interest awarded under Fifth Amendment for wrongful taking); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 (1983) (prejudgment interest awarded in patent case); *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (prejudgment interest awarded in Title VII case as "an element of complete compensation").

reviewed. As the courts below determined, Atlantic City's contention that Dr. Pevner was not entitled to prejudgment interest on his *state* claim is irrelevant since he prevailed on his *federal* (§ 1983) claim. The district court correctly noted that where a plaintiff in federal court prevails on federal and state claims which arise from the same operative facts, the plaintiff may elect to receive prejudgment interest under *either* federal *or* state law. *Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 931, 980 (D.N.J. 1994) (A 59 n. 1). In this case, Dr. Pevner requested prejudgment interest under *federal* law (A 59 n. 1). Since prejudgment interest was undoubtedly available to him as the prevailing party on a § 1983 claim, it was unnecessary for the district court to determine whether prejudgment interest was *also* available under New Jersey law (A 59 n. 1).

The district court did not abuse its discretion for the additional reason that Dr. Pevner had the right to request prejudgment interest, under *federal* law, on the *entire* amount of the judgment because *all* of the damages he was awarded were attributable to his § 1983 claim (A 18, 59). The fact that a general verdict was returned that encompassed both the § 1983 and state tort claims does not make a difference because the federal and state claims arose from the same operative facts; the district court determined that the same conduct of Atlantic City resulted in violations of § 1983 and the New Jersey Constitution; the federal and state claims were grounded upon the same common law tort principles; the district court, without objection from Atlantic City, gave one comprehensive charge on compensatory damages which covered both claims; and consistent with its charge, the district court's verdict sheet asked the jury to determine, without apportionment, the total amount of damages that was needed to fairly compensate Dr. Pevner for Atlantic City's violations of § 1983 and the New Jersey Constitution (A 16-19, 29, 59).

In finding that the district court did not abuse its discretion in awarding Dr. Pevner prejudgment interest, the Third Circuit ruled that Atlantic City's argument that the district court improperly awarded Dr. Pevner prejudgment interest on his state tort claim was meritless (SA 17 n. 7). The Third Circuit reasoned that since the district court specifically noted it was awarding all of the prejudgment interest under *federal* law, not state law, and Dr. Pevner had elected to receive the interest under *federal* law alone, "there [was] not even an issue as to whether Dr. Pevner was entitled to prejudgment interest for the City's violations of state law" (SA 17 n. 7). Accordingly, there is no factual or legal basis for this Court to review the decision to award prejudgment interest to Dr. Pevner.

CONCLUSION

For all of the foregoing reasons, respondent, Dr. Milton Pevner, respectfully urges this Court to deny Atlantic City's petition.

Respectfully submitted,

/s/_____
GARY GREEN
(Counsel of Record)
ROBERT A. DAVITCH
Sidkoff, Pincus & Green, P.C.
1101 Market Street
2700 Aramark Tower
Philadelphia, PA 19107
(215) 574-0600

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